TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1935

No. 533

DUPARQUET HUOT & MONEUSE CO., E. E. ALLEY CO., INC., AND H. B. DAY CO., INC., PETITIONERS,

vs.

FRYSINGER EVANS, DU-WEL CLEANING CONTRACTING CO., GREENLEIGH PRINTING CO., INC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED OCTOBER 22, 1935.

CERTIORARI GRANTED NOVEMBER 25, 1935.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935

No. 533

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., DECEMBER 16, 1935.

—7237-C

[fols. a & 1]

IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

In the Matter of 2168 Broadway Corporation, a Debtor Corporation

In Proceedings for the Reorganization of a Corporation Under Section 77B of the Bankruptcy Act

Creditors' Petition

To the Honorable the Judges of the United States District Court, for the Southern District of New York:

The petition of Duparquet Huot & Moneuse Co., a New York corporation, having its principal office and place of business at No. 108 West 22nd Street, in the Borough of Manhattan, City, County and State of New York, of E. E. Alley Co., Inc., a New York corporation, having its principal office and place of business at No. 39 White Street, in the Borough of Manhattan, City, County and State of New York, and of H. B. Day Co., Inc., a New York corporation, having its principal office and place of business at No. 604 West 48th Street, in the Borough of Manhattan, City, County and State of New York (hereinafter referred to as the "petitioners"), respectfully shows and alleges, upon information and belief:

1. The above-named debtor, 2168 Broadway Corporation (hereinafter referred to as the "debtor"), is a corporation organized on or about November 15, 1933, under and pursuant to the laws of the State of New York, having its principal place of business in the Borough of Manhattan, [fol. 2] City, County and State of New York, and as such is within the territorial jurisdiction of this Court.

2. Said debtor is a corporation which could become a bankrupt under §4 of the Act of Congress entitled, "An Act to establish a uniform system of bankruptcy throughout the United States" approved July 1, 1898, and Acts amendatory thereof and supplementary thereto (hereinafter referred to as the "Bankruptcy Act"); and is a

corporation which might file a petition under §77B of said Bankruptcy Act.

3. Said debtor is engaged in the holding of real estate and is not a municipal, insurance, banking, or building and loan corporation, or a railroad corporation authorized to file a petition or answer under the provisions of §77 of said Bankruptcy Act; and the present operations of said debtor do not exclude it under the provisions of §77B of said Bankruptcy Act. Said debtor is neither a wage earner nor a person engaged principally in farming or tillage of the soil.

4. The petitioners are creditors of the debtor, are three in number, and have provable claims against said debtor, which amount in the aggregate, in excess of the value of securities held by them, if any, to One Thousand Dollars ($1,000) or over.

5. The nature, computation and amount of the claim of your petitioner Duparquet Huot & Moneuse Co., are as follows: $150.00 representing balance due and owing on [fol. 3] account of goods, wares and merchandise sold and delivered by this petitioner to debtor at debtor's request and upon its promise to pay therefor from January 1, 1933, to December 31, 1933.

6. The securities, if any, held for said claims by your petitioner Duparquet Huot & Moneuse Co., are as follows: None.

7. The nature, computation and amount of the claim of your petitioner E. E. Alley Co., Inc., are as follows: $680.10 representing balance due and owing on account of goods, wares and merchandise sold and delivered by this petitioner to debtor at debtor's request and upon its promise to pay therefor between November 2, 1934, and November 27, 1934, both dates inclusive.

8. The securities, if any, held for said claims by your petitioner E. E. Alley Co., Inc., are as follows: None.

9. The nature, computation and amount of the claim of your petitioner H. B. Day Co., Inc., are as follows: $325.30, representing balance due and owing on account of goods, wares and merchandise sold and delivered by this petitioner to debtor at debtor's request and upon its promise

to pay therefor between November 1, 1934, and December 31, 1934, both dates inclusive.

10. The securities, if any, held for said claims by your petitioner H. B. Day Co., Inc., are as follows: None.

11. The debtor has not filed in this or in any other Court a petition or answer under §77B of said Bankruptcy Act, [fol. 4] and this Court is one in which said debtor corporation might file such petition.

12. The debtor is unable to meet its debts as they mature.

13. The debtor during the six months preceding the filing of this petition, has had its principal place of business at 2166-2168 Broadway, in the Borough of Manhattan, City, County and State of New York, which is within the territorial jurisdiction of this Court.

14. The said debtor has committed an act of bankruptcy within four months hereof, as follows:

Heretofore and on or about October 15, 1934, by the service of a summons and complaint and the filing of a lis pendens, an action was commenced in the Supreme Court of the State of New York, County of New York, by Gertrude C. Buttenweiser against the debtor, to foreclose a mortgage in the principal sum of $42,500 held by the said Buttenweiser on the property of the said debtor. The complaint in said action alleged the debtor's default in payment of interest on said mortgage, which said mortgage matured on September 19, 1934. Thereafter and on or about December 19, 1934, by order of said Supreme Court receivers of the said property of the said debtor were appointed in said action. Said receivers entered into possession of and now hold the said property and are receiving and administering the income therefrom for the benefit of the said plaintiff in said action. Said receivership is now in full force [fol. 5] and effect and has not been revoked or terminated.

15. The petitioners as such creditors aforesaid of the debtor, propose that the debtor shall effect a reorganizaiton under and pursuant to §77B of the Bankruptcy Act.

16. Annexed hereto and marked Exhibit A is a brief description of the assets, liabilities and financial condition of the said debtor, to petitioners' best information and belief. Petitioners believe that said debtor has liabilities

in excess of those set forth in said schedule, but are without information or knowledge with respect thereto.

17. The capital stock of the said debtor consists of 16,500 shares of the par value of One Dollar each ($1.00), all of which are issued and outstanding.

18. A brief description of the financial condition of the debtor is as set forth in the aforesaid statement, Exhibit A, hereto annexed, and, so far as known to your petitioners, is in further detail as follows:

The debtor is unable to meet its matured and maturing obligations. It has defaulted in the payment of interest and principal upon a mortgage in the amount of $42,500, which matured on September 19, 1934. The total value of its assets taken at values reflected by current market conditions, exceeds the total amount of its liabilities, but said value cannot be immediately realized without great sacri- [fol. 6] fice. Its only property is being administered by receivers in the foreclosure action hereinbefore mentioned. Other creditors of the corporation are pressing for payment of their respective claims. The debtor is in arrears in New York municipal taxes approximating $260,000.

19. The facts showing the need for relief under §77B of the Bankruptcy Act are all of the facts hereinbefore alleged, and in addition thereto the following:

(a) The assets of said debtor are of great value. Under present market and financial conditions, however, any sale thereof, particularly immediate or forced, would result in great diminution in value and cause unnecessary and excessively great losses to lienors, creditors and others having interests in or claims against the same, especially in view of the improbability of obtaining presently or in the near future, any bona fide purchasers with sufficient means, ready, able and willing to purchase the whole or a substantial part thereof at a fair and reasonable price.

(b) The said debtor maintains and operates as a hotel the building on said premises, which is known as Manhattan Towers. Its business as now existing and conducted is in serious danger of great deterioration and loss, by virtue of the pending foreclosure action and pressure of other creditors. If a plan of reorganization can be effected it will result in a great saving of the assets of the debtor which

will redound to the benefit of the creditors and stockholders [fol. 7] of the debtor. Petitioners verily believe that if the debtor's assets are safely conserved and managed, they will ultimately be sufficient to satisfy in full all creditors of the debtor.

(c) It is essential for the protection of the interests of the stockholders and of all creditors that the forced liquidation of the debtor's assets should be avoided, and all creditors be restrained from prosecuting their claims except in these proceedings. Such liquidation will be accomplished if said foreclosure action should result in a sale pursuant to the judgment to be obtained in the said action. The property if sold at this time would bring but little to the estate because of the present depression in the real estate market. The said property of the said debtor formerly secured a mortgage in the amount of $1,650,000 and the assessed valuation exceeds $1,500,000. A forced sale at this time would net but a small fraction of its actual value.

20. The said debtor is a subsidiary of, and all the stock thereof is held by or for Commonwealth Bond Corporation, as to which corporation a petition under §77B of the Bankruptcy Act is now pending in this Court. Harvey T. Mann, Esq., was appointed Trustee for the said Commonwealth Bond Corporation by order of this Court on January 11, 1935, and has qualified and is now acting as such Trustee.

21. This petition is filed in good faith, and is neither collusive nor for the purpose of obtaining any preference or improper advantage for any one creditor or other party [fol. 8] in interest over any other creditor or other party in interest, or for any class of parties in interest over any other class of parties in interest, save as such classes are lawfully entitled to such preferences, if any, by virtue of their liens or securities.

22. Except as hereinabove set forth, no prior proceeding is pending in this or any other United States District Court for the relief herein sought, or for any part thereof; and no prior application has ever been made to this or to any other such court for the relief herein petitioned.

Wherefore, your petitioners pray:

1. That service of this petition with a subpœna may be made upon 2168 Broadway Corporation, the debtor, or any

of its officers, as provided by the Acts of Congress relating to bankruptcy.

2. That this Honorable Court approve this petition and that proceedings be had in accordance with the provisions of § 77B of the Bankruptcy Act.

3. That this Honorable Court, or a Judge thereof, appoint a trustee, or trustees, of the debtor's estate, with all rights, powers, privileges, duties and immunities that a trustee may have under said sections of the Bankruptcy Act.

4. That this Honorable Court, or a Judge thereof, shall direct the debtor corporation and/or such trustee, or trustees, to file such schedules and submit such other informa-
[fol. 9] tion as may be necessary to disclose the conduct of the debtor's affairs and the fairness of any proposed plan.

5. That this Honorable Court, or a Judge thereof, shall make order staying, until after final decree, any suit against the debtor upon a claim from which a discharge would be a release, and enjoin, and/or stay, the commencement or continuation of suits against the debtor until after final decree; and, upon notice and for cause shown, enjoin or stay the commencement or continuance of any judicial proceeding to enforce any lien upon the estate of the debtor or any part thereof until after final decree.

6. That your petitioners be permitted to submit one or more plans and suggestions for the reorganization of the debtor, including any disposition to be made of its assets and properties, pursuant to § 77B of said Bankruptcy Act.

7. That your petitioners may have such other, further and different relief as to the Court may seem just, lawful and proper.

Dated, New York, January 30, 1935.

Duparquet Huot & Moneuse Co., by Edward A. Griffiths, Treasurer. (Seal.) E. E. Alley Co., Inc., by C. E. Morrison, Treasurer. (Seal.) H. B. Day Co., Inc., by Thomas F. Egan, Treasurer, (Seal). Petitioners.

[fols. 10 & 11] *Duly sworn to by Edward A. Griffiths et al. Jurats omitted in printing.*

[fol. 12] SCHEDULE 'A TO CREDITORS' PETITION

Assets:

Real Estate and building with furniture and fixtures located thereon, situate at the corner of Broadway and 74th Street, and described as No. 2166-2168 Broadway, in the Borough of Manhattan, City of New York, the value of which property, upon information and belief, is in excess of	$1,500,000.00

Liabilities:

Arrears for taxes	$260,000.00	
Mortgage indebtedness, exclusive of interest	42,500.00	
Creditors claiming to hold security (approximately)	86,509.73	
Accounts payable: Unsecured (approximately)	3,375.31	
Total		$392,385.04

[fol. 13] IN UNITED STATES DISTRICT COURT

[Title omitted]

NOTICE OF MOTION TO DISMISS—February 7, 1935

SIRS:

Please Take Notice, that Frysinger Evans, a creditor as defined and within the meaning of Section 77B of the National Bankruptcy Act as amended, of the above named Debtor, and having a claim against the Debtor within the meaning of the said Act, will make application before the Hon. John C. Knox, United States District Judge for the Southern District of New York, and who has assumed jurisdiction in the above entitled proceeding, at a hearing to be held by him in said proceeding on the 7th day of February, 1935, at 4 o'clock in the afternoon of said day, at the Chambers of the said Hon. John C. Knox, Woolworth Building, Borough of Manhattan, City, County and State of New York, for an order dismissing the petition filed herein by

Duparquet Huot & Moneuse Co., E. E. Alley Co., Inc., and H. B. Day Co., Inc., on the ground that the said petition does not state facts sufficient to constitute a cause of action, and does not set forth the jurisdictional requirements of Section 77B of the National Bankruptcy Act as amended, in the following particulars:

[fol. 14] 1. The aforesaid alleged creditors named in said petition as creditors of the Debtor are not in fact creditors of the Debtor.

2. That said petition does not set forth an act of bankruptcy within the meaning of Section 77B (a) of the National Bankruptcy Act, as amended.

3. That the said petition was not filed in good faith within the meaning of Section 77B (a) (b) of the National Bankruptcy Act, as amended.

4. That the Court has no jurisdiction of the Debtor or over its property.

Or, in the alternative, in the event that the Court shall deny the relief sought by the undersigned, for leave to file an answer to the petition herein within ten days after said decision of the Court and notice thereof, and for such other and further relief as to the Court may seem just and proper.

Dated, New York, N. Y., February 7th, 1935.

Yours, etc., Daniel A. Shirk, Attorney For Frysinger Evans, Appearing Specially for this Motion, Office & P. O. Address, 170 Broadway, Borough of Manhattan, New York City.

To Harper & Matthews, Esqs., Attorneys for Petitioning Creditors, 70 Pine Street, Borough of Manhattan, New York City.

[fol. 15] IN UNITED STATES DISTRICT COURT

[Title omitted]

NOTICE OF MOTION TO DISMISS—April 6, 1935

SIRS:

Please Take Notice, that the undersigned, on behalf of the three creditors of the above named alleged debtor,

within the meaning of Section 77B of the National Bankruptcy Act as amended, and upon whose behalf he filed an answer herein with the said Honorable John C. Knox, a copy of which answer has heretofore been served upon you, will make application before the Hon. John C. Knox, United States District Judge for the Southern District of New York, the Judge in charge of the above-entitled matter, at a hearing to be held by him in connection therewith on the 11th day of April, 1935, at 10:30 o'clock in the forenoon of that day, or as soon thereafter as Counsel can be heard, at Room 401 of the Old Post Office Building, Park Row, Borough of Manhattan, New York City, for an order dismissing the petition filed herein by Duparquet Huot & Moneuse Co., E. E. Alley Co., Inc., and H. B. Day Co., Inc., on the ground that the said petition does not state facts sufficient to constitute a cause of action, and does not set forth the jurisdictional requirements of Section 77B of the National Bankruptcy Act as amended, in the following particulars:

[fol. 16] 1. The aforesaid alleged creditors, or one or more of them named in said petition as creditors of the Debtor are not in fact creditors of the Debtor.

2. That said petition does not set forth an act of bankruptcy within the meaning of Section 77B (a) of the National Bankruptcy Act, as amended.

3. That the said petition was not filed in good faith within the meaning of Section 77B (a) (b) of the National Bankruptcy Act, as amended.

4. That the Court has no jurisdiction of the debtor or over its property.

Dated, New York, N. Y., April 6th, 1935.

Yours, etc., Milton A. Goldiner, Attorney for Creditors, Du-Wel Cleaning Contracting Co., Greenleigh Printing Co., Inc., Gramercy Quality Laundry Co., Inc., Office & P. O. Address, 170 Broadway, Borough of Manhattan, City of New York.

To Harper & Matthews, Esqs., Attorneys for Petitioning Creditors, 70 Pine Street, New York City. J. Harlan O'Connell, Esq., Attorney for Alleged Debtor, 61 Broadway, New York City.

[fol. 17] IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

#61346

In the Matter of 2168 BROADWAY CORPORATION, Alleged Debtor

MEMORANDUM, KNOX, D. J.—May, 1935

KNOX, D. J.:

A receivership that is merely incidental to the foreclosure of a mortgage upon real estate of a corporate debtor that is unable to meet its debts as they mature, is not of the quality of the "equity receivership," which, under the provisions of sub-division (a) of Section 77B of the bankruptcy statute, and in the absence of an act of bankruptcy, will confer upon creditors of such debtor a right to subject it and its property to the jurisdiction of this court. See In the Matter of Laclede Gas Light Company, United States District Court, Eastern District of Missouri, June 26, 1934; Standard Accident Insurance Company v. E. T. Sheftall & Company, 53 F. (2d) 40; and Schmidtman v. Atlantic Phosphate & Oil Corporation, 230 F. 769, 771.

In my opinion, the "equity receivership" contemplated by Section 77B is of much wider scope than that which frequently accompanies foreclosure proceedings; for ex-[fol. 18] ample, a general receivership, or one such as characterized the socalled "conservation suits" with which all of us are familiar. These suits usually resulted in the reorganization of a corporate debtor, or the pro rata distribution of its assets among its creditors. I am aware, of course, that the United States District Court for the Eastern District of Illinois in the matter of Flamingo Hotel Company, decided August 9, 1934, and in the case of Surf Building Corporation, decided October 13, 1934, entertains a contrary view. But, I cannot agree therewith. Adjudications dealing with Section 3(a) sub-division 5 of the Bankruptcy Act, and which long antedate the enactment of 77B, hold that an appointment of a receiver or trustee of the property of an alleged bankrupt, in order to constitute an act of bankruptcy, relates to such an appointment in the course of a general receivership, and not to one for

specifically described property and which occurs in the progress of the ordinary foreclosure action. I see no occasion to infer that Congress, in enacting 77B, intended that a foreclosure receivership of a specific piece of real estate, even though it may constitute the debtor's only asset, should be comprehended by the words, "equity receivership" as they are used in the statute under consideration. Had the national legislature wished to include foreclosure receiverships within the descriptive words it saw fit to employ, I think the language would have been more explicit. In construing the words "equity receivership" as employed in 77B, it is necessary to take note of the fact that apparently they are used in apposition to the phrase "a prior proceeding in bankruptcy," which proceeding of course, looks for- [fol. 19] ward to the ratable distribution of a bankrupt's assets among its creditors. Such is not the necessary or usual objective of a foreclosure receivership. Its primary purpose is to protect a mortgagee whilst he completes the formalities of the foreclosure of his lien. The mortgagor's unsecured creditors can not participate either in the mortgaged security, or in its avails, until the lien holder is fully satisfied. Equity receiverships, on the other hand, as customarily administered in the Federal courts, took on many of the habiliments of bankruptcy proceedings. Often they were a substitute, if not a subterfuge, for bankruptcies, and, in one form or another, finally wound up the affairs of the defendant corporation. Hence, I conclude that the foreclosure receivership on which petitioners rely, is not sufficient to enable the alleged debtor to be subjected to the provisions of 77B of the Bankruptcy Act, and the petition to that end will be dismissed.

With respect to petitioners' argument that the answer herein supplies any deficiency that may exist in the petition, it is necessary only to say that the attorney filing the answer has indicated his wish to withdraw the same, and further that it, too, is under attack by an alleged officer and director of the debtor. Under these circumstances, I think too much reliance should not be placed thereon.

May 8th, 1935.

Jno. C. Knox, U. S. D. J.

[fol. 20] IN UNITED STATES DISTRICT COURT

#61,346—In Bankruptcy

In the Matter of 2168 BROADWAY CORPORATION, Alleged Debtor

In a Proceeding for a Corporate Reorganization Under Section 77B of the Bankruptcy Act

ORDER DISMISSING PETITION—May 13, 1935

Three alleged creditors of the above-named alleged debtor having duly filed with the Clerk of this Court a petition, pursuant to Section 77B of the Bankruptcy Act, in a proceeding for a corporate reorganization on February 1st, 1935, and thereafter Frysinger Evans, creditor of the above-named alleged debtor, having duly served and filed notice of motion to dismiss the said petition, on the ground that on its face the said petition does not set forth sufficient facts to comply with the jurisdictional requirements of Section 77B of the National Bankruptcy Act as amended, and is therefore insufficient in law, and thereafter three alleged creditors of the above-named alleged debtor, to-wit: Du-Wel Cleaning Contracting Co., Greenleigh Printing Co., Inc. and Gramercy Quality Laundry Co., Inc., by their attorney, [fol. 21] Milton A. Goldiner, Esq., having duly served and filed notice of motion to dismiss the aforesaid petition on the ground that said petition does not set forth the jurisdictional requirements under Section 77B of the National Bankruptcy Act as amended, and is therefore insufficient in law,

Now on reading the petition of Duparquet Huot & Moneuse Co., E. E. Alley Co., Inc. and H. B. Day Co., Inc., dated January 30th, 1935, verified January 31st, 1935 and February 1st, 1935, together with Schedule "A" thereto annexed and made part thereof, and filed with the Clerk of this Court on February 1st, 1935, and on reading and filing the notice of motion dated February 7th, 1935, wherein Frysinger Evans appears by Daniel A. Shirk, his attorney, specially for the purposes of said motion, the notice of motion dated April 6th, 1935, served on behalf of Du-Wel Cleaning Contracting Co., Greenleigh Printing Co., Inc. and Gramercy Quality Laundry Co., Inc., three creditors of the

alleged debtor who appeared by Milton A. Goldiner, Esq., their attorney (Daniel A. Shirk, Esq., of Counsel), all read in support of said motion, and argument of said motion having been had on April 18th, 1935, and after hearing Daniel A. Shirk, as attorney for Frysinger Evans, appearing specially and as counsel on behalf of Milton A. Goldiner, Esq., attorney appearing generally for three creditors, as aforesaid, in support of said motion to dismiss, and Harper & Matthews, Esqs. (Mr. Harold Harper, of Counsel) attorneys for the petitioning creditors in opposition thereto; and on due deliberation, it is,

[fol. 22] On motion of Daniel A. Shirk, appearing specially as attorney for Frysinger Evans and on motion of Milton A. Goldiner, appearing generally on behalf of three creditors of the alleged debtor,

Ordered, that said motion to dismiss the petition herein be and the same hereby is in all respects granted.

John C. Knox, U. S. D. J.

IN UNITED STATES DISTRICT COURT

[Title omitted]

PETITION FOR APPEAL

An order having been entered herein on or about the 14th day of May, 1935, in the United States District Court for the Southern District of New York, granting the motion of Frysinger Evans, Du-Wel Cleaning Contracting Co., Greenleigh Printing Co., Inc. and Gramercy Quality Laundry Co., Inc., to dismiss the petition of Duparquet Huot & Moneuse Co., E. E. Alley Co., Inc. and H. B. Day Co., Inc., heretofore filed herein, for the reorganization of 2168 Broadway Corporation, a New York Corporation, in accordance with § 77B of the National Bankruptcy Act as amended,

[fol. 23] And Duparquet Huot & Moneuse Co., E. E. Alley Co., Inc. and H. B. Day Co., Inc., the petitioning creditors, conceiving themselves aggrieved by said order, do hereby pray that an appeal be allowed to them from said order to the United States Circuit Court of Appeals for the Second Circuit, and in connection with this petition do

hereby present their assignments of error, and further pray that a proper transcript of the record of proceedings and papers upon which said order was made, duly authenticated, be transmitted to the United States Circuit Court of Appeals for the Second Circuit.

Dated, New York, May 22, 1935.

Duparquet Huot & Moneuse Co., E. E. Alley Co., Inc., H. B. Day Co., Inc., Petitioning Creditors, by Harper & Matthews, Attorneys for Petitioning Creditors, Office & P. O. Address, No. 70 Pine Street, Borough of Manhattan, City of New York.

IN UNITED STATES DISTRICT COURT

ORDER ALLOWING APPEAL

The above appeal is allowed upon filing a bond for the costs in the sum of Two Hundred Fifty Dollars ($250).

Dated, New York, May 25th, 1935.

Jno. C. Knox, U. S. D. J.

[fol. 24] IN UNITED STATES DISTRICT COURT

[Title omitted]

ASSIGNMENTS OF ERROR

Duparquet Huot & Moneuse Co., E. E. Alley Co., Inc. and H. B. Day Co., Inc., hereby file the following assignments of error upon their appeal from the order of the United States District Court for the Southern District of New York, entered herein on May 14, 1935, granting in all respects the motion of Frysinger Evans, appearing specially herein, and of Du-Wel Cleaning Contracting Co., Greenleigh Printing Co., Inc. and Gramercy Quality Laundry Co., Inc., three creditors of the alleged debtor appearing generally herein, to dismiss the petition (hereinafter called "the petition"), of Duparquet Huot & Moneuse Co., E. E. Alley Co., Inc. and H. B. Day Co., Inc., in a proceeding for a reorganization of 2168 Broadway Corporation pursuant to § 77B of the Bankruptcy Act, viz.:

1. That the said District Court erred in dismissing the petition.

2. That the said District Court erred in granting the said motion to dismiss on the ground that the petition did not comply with the provisions of § 77B of the Bankruptcy Act as amended and was insufficient in law.

[fol. 25] 3. That the said District Court erred in holding that the petition failed to allege that a prior proceeding in equity receivership was pending within the meaning of § 77B of the Bankruptcy Act.

4. That the said District Court erred in holding that it was necessary that the petition allege that a prior proceeding in equity receivership was pending against the alleged debtor or that the alleged debtor had committed an act of bankruptcy within four months in a case where the petition alleged that a receiver of all of the property of the corporation had been appointed by a State Court.

5. That the aforesaid order granting the said motion is contrary to law.

6. That the said District Court erred in making the whole of said order and each and every part thereof.

Dated, New York, May 22, 1935.

Duparquet Huot & Moneuse Co., E. E. Alley Co., Inc., H. B. Day Co., Inc., Petitioning Creditors, by Harper & Matthews, Attorneys for Petitioning Creditors, Office & P. O. Address, No. 70 Pine Street, Borough of Manhattan, City of New York.

[fol. 26] Citation, in usual form, omitted in printing.

[fol. 27] IN UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT

[Title omitted]

ORDER OF UNITED STATES CIRCUIT COURT OF APPEALS ALLOWING APPEAL—June 6, 1935

A motion having been made herein by counsel for the appellants for leave to appeal from a certain order of the District Court entered May 14, 1935;

Upon consideration thereof, it is

Ordered that said motion be and hereby is granted.

Wm. Parkin, Clerk.

[fol. 28] IN UNITED STATES DISTRICT COURT

[Title omitted]

STIPULATION AS TO TRANSCRIPT OF RECORD

It is hereby stipulated and agreed, that the foregoing is a true transcript of the record of the said District Court in the above-entitled matter as agreed on by the parties.

Dated, June —, 1935.

Harper & Matthews, Attorneys for Appellants.
Daniel A. Shirk, Attorney for Frysinger Evans.
Milton A. Goldiner, Attorney for Creditors.

[fol. 29] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 30] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

October Term, 1934

No. 494

Argued June 19, 1935. Decided July 15, 1935

In the Matter of 2168 BROADWAY CORPORATION, Alleged Debtor,

DUPARQUET, HUOT & MONEUSE Co., E. E. ALLEY Co., and H. B. DAY Co., INC., Appellants

Appeal from the District Court of the United States for the Southern District of New York

Before Manton, Swan, and Augustus N. Hand, Circuit Judges

Three creditors of 2168 Broadway Corporation filed a petition under Section 77B of the Bankruptcy Act (11 U. S. C. A., § 207), alleging that receivers had been appointed in a mortgage foreclosure action brought against the said corporation. From an order granting the motion of other creditors to dismiss the petition as insufficient on its face, the petitioners have appealed. Order affirmed.

Harper & Matthews, of New York City (Mark M. Horblit, of Boston, Mass., and Harold Harper, of New York City, of counsel), for appellant.

Daniel A. Shirk and Milton A. Goldiner, both of New York City (Edwin R. Wolff and Daniel A. Shirk, both of New York City, of counsel), for appellees.

SWAN, Circuit Judge:

It is provided by Section 77B (a), Bankr. Act, 11 U. S. C. A., § 207 (a), that three or more creditors, who have provable claims against a corporation aggregating $1,000 or more in excess of the value of securities, may file "a petition stating that such corporation is insolvent or unable to meet its debts as they mature and, if a prior proceeding in bankruptcy or equity receivership is not pending, that it has committed an act of bankruptcy within four months,"

and that such creditors propose that it shall effect a reorganization. Subdivision (i), § 77B of the Act, 11 U. S. C. A., § 207 (i), further provides: "If a receiver or trustee of all or any part of the property of a corporation has been appointed by a Federal, State or Territorial court * * * a petition or answer may be filed under this sectioin at any time thereafter by the corporation, or its creditors as provided in subdivision (a) of this section." The appellants are three creditors of 2168 Broadway Corporation, a New York corporation which holds the title to premises known as 2166-2168 Broadway. They filed a petition for the reorganization of their debtor, alleging that receivers had been appointed in an action commenced in the state court to foreclose a mortgage upon the debtor's property and that such receivers were in possession of its only property and administering the income therefrom for the benefit of the plaintiff in said action. Upon motion of other creditors of the debtor corporation the District Court dismissed the petition on the ground that a mortgage foreclosure suit, in which receivers have been appointed, is not an "equity receivership" within the meaning of Section 77B. The correctness of this construction is the sole question presented.

Because the statute is of so recent enactment there has been as yet but little expression of judicial opinion on this [fol. 31] important question. In three cases arising in the Eastern District of Illinois, Judge Lindley has held a mortgage foreclosure suit in which receivers were appointed to be an "equity receivership" for the purposes of Section 77B. In re Flamingo Hotel Co. (August 9, 1934, not reported [1]); In re Surf Building Corp., (Oct. 17, 1934) — F. Supp. —; In re Granada Hotel Corp., (D. C.) 9 F. Supp. 909. The case last cited has been affirmed by the Circuit Court of Appeals for the Seventh Circuit in a short per curiam opinion, handed down June 5, 1935, — F. (2d) —. Opposed to these decisions is the opinion of Judge Knox in the case at bar, a decision by Judge Hulbert in In re Draco Realty Corp., (D. C. S. D. N. Y., June 3, 1935), and a dictum by Judge Faris in In re Laclede Gas Light Co. (D. C. S. D. Mo., June 26, 1934, not reported [1]). See, also, 48 Harv. L. Rev. 39, 54, note 57.

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[1] Oral and not for publication.

[1] Oral and not for publication.

The appellants argue that the words "equity receivership" are too clear to admit of construction and that custody of the property of a corporation by a receiver appointed in the exercise of chancery powers in any suit in equity must necessarily satisfy the requirements of the statute. It cannot be gainsaid that an action to foreclose a mortgage is a suit in equity, or that the receiver appointed in such a suit to conserve the mortgaged property and collect the rents pending foreclosure may properly be called a receiver in equity. See Carmody's N. Y. Practice (2d Ed), Vol. 8, § 1023; Gordon v. Washington, 294 U. S. —, 55 S. Ct. 584, 79 L. Ed. — (April 1, 1935). Nevertheless, it by no means follows that that is the type of suit Congress had in mind when it used the words in question. It would be strange indeed to call such a suit an "equity receivership"; so far as we are aware, a foreclosure action is never so referred to. The kind of suit to which those words are usually applied in common parlance is one commenced by a simple contract creditor praying for the conservation of the assets of a corporation insolvent in the common-law sense, in which the corporation confesses the allegations of the bill and consents to the appointment of a receiver. The end sought by such a suit is the liquidation of the assets and their equitable distribution among creditors (Gordon v. Washington, supra), although in rare instances successful administration in receivership may restore to the corporation the ability to meet its debts in due course and the right to repossess its assets. The hope of saving the business is the impelling motive for such an equity receivership, as is indicated by the name "conservation suit," by which it is sometimes called. In our opinion it was a receivership of this general type, initiated by suit by a general creditor or a stockholder of the corporation, which Congress had in mind. Compare Bryan v. Welch, 74 F. (2d) 964 (C. C. A. 10). We do not think it was intended that the appointment of a receiver in foreclosure who takes possession of a specific piece of property for the sole benefit of the lienholder should serve as the basis for involuntary reorganization proceedings.

It is urged that this kind of equity receivership originated in the eastern part of the country and has not been used generally throughout the nation, except as to railroad corporations; that to construe the words as we have indicated is to ascribe to them a colloquial meaning contrary to well-

recognized canons of statutory construction. But the debates in Congress during the progress of the bill, although not affording any conclusive evidence of the meaning of the words in question, indicate that the legislators were thoroughly familiar with this type of receivership. See 78 Cong. Rec. 7890, 7905-7907. Moreover, the words are used in apposition to "a prior proceeding in bankruptcy." If either a proceeding in bankruptcy or an equity receivership is pending, it is unnecessary to allege that the corporation has committed an act of bankruptcy within four months. The appointment of a receiver in foreclosure proceedings is not an act of bankruptcy. See Standard Accident Ins. Co. v. E. T. Sheftall & Co., 53 F. (2d) 40, 41 (C. C. A. 4). The canon of ejusdem generis is applicable. Bankruptcy looks to a liquidation of assets and an equitable distribution among creditors. So also does an equity receivership in a "conservation suit." When Congress enacted Section 77B, a distressingly large number of corporations had already been, or were in danger of being, placed in bankruptcy or equity receivership of the type described. It was seen that immediate liquidation of the assets would result in [fol. 32] economic waste and unnecessary loss to creditors and stockholders. The purpose of the legislation was to supersede proceedings looking to liquidation by proceedings looking to reorganization if there was an honest prospect that a plan fair to all interests could be devised to save the business. The benefits of the plan could be sought voluntarily by the debtor corporation, or they could be obtained upon an involuntary petition filed by creditors under the conditions specified. Reading the language in the setting in which it is used and in the light of the purpose of the legislation, we cannot think that Congress intended to give three creditors having claims totaling as little at $1,000, the right to force a corporation into a reorganization, if a receiver were appointed in the foreclosure of a mortgage covering any of its property. Situations may well be imagined in which a corporation might allow a mortgage on part of its land or on a chattel to be foreclosed, with the appointment of a receiver pending foreclosure, without being in any need of a reorganization. We do not believe that it was the purpose of Congress to permit every foreclosure proceeding in which a receiver might be appointed to be superseded by an involuntary reorganization. In the case at bar the mortgage covered all

the debtor's property, but the logic of the appellants' position, as they concede, compels them to argue for the same results however small a portion of the debtor's property may be involved in foreclosure. Subdivision (i), it is true, refers to the appointment of all or any part of the property of a corporation. This, we think, contemplates a situation where the corporation may have property outside the jurisdiction of the appointing court, in which case only part of its property could be in equity receivership without ancillary proceedings. In our opinion the District Court correctly construed the statute.

Accordingly the order is affirmed.

[fol. 33] UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT

At a stated term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the Court Rooms in the Post Office Building in the City of New York, on the 22nd day of July, one thousand nine hundred and thirty-five.

Present: Hon. Martin T. Manton, Hon. Thomas W. Swan, Hon. Augustus N. Hand, Circuit Judges.

In the Matter of 2168 BROADWAY CORPORATION, Alleged Debtor, Duparquet, Huot & Moneuse Co., et al., Appellants

Appeal from the District Court of the United States for the Southern District of New York

This cause came on to be heard on the transcript of record from the District Court of the United States for the Southern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is affirmed with costs.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

Wm. Parkin, Clerk.

[fol. 34] [Endorsed:] United States Circuit Court of Appeals, Second Circuit. In re 2168 Broadway Corporation. Order for Mandate. United States Circuit Court of Appeals, Second Circuit. Filed Jul. 22, 1935. William Parkin, Clerk.

[fol. 35] UNITED STATES OF AMERICA,
Southern District of New York:

I, William Parkin, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby certify that the foregoing pages, numbered from 1 to 34, inclusive, contain a true and complete transcript of the record and proceedings had in said Court, in the case of In the Matter of 2168 Broadway Corporation, Alleged Debtor—Duparquet, Huot & Moneuse Co. et al., Appellants, as the same remain of record and on file in my office.

In Testimony Whereof I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 14th day of October, in the year of our Lord one thousand nine hundred and thirty-five, and of the Independence of the said United States the one hundred and sixtieth.

Wm. Parkin, Clerk. (Seal United States Circuit Court of Appeals, Second Circuit.)

[fol. 36] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed November 25, 1935

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted, and the case is assigned for argument immediately following No. 428.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 40,087. U. S. Circuit Court of Appeals, Second Circuit. Term No. 533. Duparquet Huot & Moneuse Co., E. E. Alley Co., Inc., and H. B. Day Co., Inc., petitioners, vs. Frysinger Evans, Du-Wel Cleaning Contracting Co., Greenleigh Printing Co., Inc., et al. Petition for a writ of certiorari and exhibit thereto. Filed October 22, 1935. Term No. 533, O. T., 1935.

(7237-C)

FILE COPY

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CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935.

No. 533

DUPARQUET HUOT & MONEUSE CO., E. E. ALLEY CO., INC., AND H. B. DAY CO., INC.,

Petitioners,

vs.

FRYSINGER EVANS, DU-WEL CLEANING CONTRACTING CO., GREENLEIGH PRINTING CO., INC., AND GRAMERCY QUALITY LAUNDRY CO., INC.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF.

HAROLD HARPER,
MARK M. HORBLIT,
Counsel for Petitioners.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935

No. 533

IN THE MATTER OF 2168 BROADWAY CORPORATION,
Debtor;

DUPARQUET HUOT & MONEUSE CO., E. E. ALLEY CO., INC., AND H. B. DAY CO., INC.,
Petitioners,

vs.

FRYSINGER EVANS, DU-WEL CLEANING CONTRACTING CO., GREENLEIGH PRINTING CO., INC., AND GRAMERCY QUALITY LAUNDRY CO., INC.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petition of Duparquet Huot & Moneuse Co., E. E. Alley Co., Inc., and H. B. Day Co., Inc., for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit alleges:

By its judgment of July 22, 1935 (R. 34), the Circuit Court of Appeals has affirmed the order of the District

Court for the Southern District of New York, made May 13, 1935, by Hon. John C. Knox, District Judge (R. 20-22), which dismissed as insufficient in law the petition for the reorganization under § 77B of the Bankruptcy Act of 2168 Broadway Corporation, a debtor.

The petitioners below, who now petition for certiorari, were three (3) unsecured creditors of the debtor who had provable claims amounting in the aggregate to more than $1,000 (R. 1-3). Their petition alleged that the debtor, during the six months preceding, had had its principal place of business in the Southern District of New York, that it was unable to meet its debts as they matured, and that petitioners proposed that the debtor should effect a reorganization under § 77B (R. 4-5).

The petition in the District Court also alleged the following facts:

On October 15, 1934, an action was commenced in the New York Supreme Court, by Gertrude C. Buttenweiser against the debtor, to foreclose for default in payment of interest a mortgage in the principal sum of $42,500 on the property of the debtor. The mortgage had matured on September 19, 1934. On December 19, 1934, by order of the New York Supreme Court, receivers were appointed. They entered into possession of the property, and were receiving and administering the income therefrom for the benefit of the plaintiff. The receivership was in full force and effect (R. 4).

The petition further alleged that the debtor maintained and operated on the premises the hotel, Manhattan Towers (R. 6); that the total value of the debtor's assets exceeded the total amount of its liabilities, but that said value could not be immediately realized without great sacrifice (R. 5). "Its only property is being administered by receivers in the foreclosure action hereinbefore mentioned" (R. 6).

The petition alleged that other creditors of the corporation were pressing, that the debtor was in arrears in New York municipal taxes approximating $260,000 (R. 6); that the debtor's business was in serious danger of great deterioration and loss by virtue of the pending foreclosure action and pressure of other creditors, and that if a plan of reorganization could be effected it would result in a great saving of the assets of the debtor, which would redound to the benefit of the creditors and stockholders (R. 6). The petition alleged that if the debtor's assets were safely conserved and managed, they would ultimately be sufficient to satisfy all creditors in full; that it was essential for the protection of stockholders and creditors that a forced liquidation be avoided and that creditors be restrained from prosecuting their claims except under the 77B proceeding (R. 7); that such a liquidation would be accomplished if said foreclosure action should result in a sale pursuant to the judgment to be obtained in that action; that the property if sold at this time would bring but little to the estate because of the present depression in the real estate market; that the debtor's property formerly secured a mortgage in the amount of $1,650,000 and that its assessed valuation exceeded $1,500,000 (R. 7). A schedule annexed to the petition, which only purported to be an approximation, showed assets of $1,500,000 and liabilities of $392,385.04 (R. 12).

The petition in the district court did not allege that the debtor had committed an act of bankruptcy within four months, nor that a prior proceeding in bankruptcy was pending. It did allege that the debtor's property was in custody of receivers appointed by the state court in a suit in equity to foreclose a mortgage. The sole question presented is whether this constituted an "equity receivership • • • pending," which is an alternative requirement of § 77B.

QUESTION.

Whether custody of the debtor's property by receivers appointed by the State court in an action to foreclose a mortgage is a pending equity receivership under Section 77B.

The district court in dismissing the petition and the Circuit Court of Appeals in affirming its order have held that such a foreclosure receivership in the State court is not the required "equity receivership * * * pending." This application seeks to review that question.

The Circuit Court of Appeals for the Seventh Circuit *In the Matter of Granada Hotel Corporation, debtor,* 78 F. (2d) 409, has held that a mortgage foreclosure receivership in the State court is such an equity receivership, said decision having been rendered on June 5, 1935 (re-hearing denied July 26, 1935). That decision is the subject of an application now pending for certiorari from this Court to the Seventh Circuit Court of Appeals (No. 428).

STATUTE.

The portions of § 77B of the National Bankruptcy Act as amended that are material are as follows:

> "(a) * * * Three or more creditors who have provable claims against any corporation which amount in the aggregate, in excess of the value of securities held by them, if any, to $1,000 or over may, if such corporation has not filed a petition or answer under this section, file with the court in which such corporation might file a petition under this section, a petition stating that such corporation is insolvent or unable to meet its debts as they mature and, if a prior proceeding in bankruptcy or equity receivership is not pending, that it has committed an act of bankruptcy within four months, that such creditors propose that it shall effect

a reorganization; and such corporation shall, within ten days after the service of a copy of such petition upon it, answer such petition. * * *"

"(i) If a receiver or trustee of all or any part of the property of a corporation has been appointed by a Federal, State, or Territorial court, whether before or after June 7, 1934, at 12 o'clock noon a petition or answer may be filed under this section at any time thereafter by the corporation, or its creditors as provided in subdivision (a) of this section and if such petition or answer is approved, the trustee or trustees appointed under this section, or the debtor if no trustee is appointed, shall be entitled forthwith to possession of and vested with title to such property, and the judge shall make such orders as he may deem equitable for the protection of obligations incurred by the receiver or prior trustee and for the payment of such reasonable administrative expenses and allowances in the prior proceeding as may be fixed by the court appointing said receiver or prior trustee."

REASONS FOR GRANTING CERTIORARI.

The reasons for granting certiorari in this case are:

(1) The question is of public importance. The necessary effect of the decision below is to exclude from relief and reorganization under § 77B of the Bankruptcy Act at the instance of creditors practically all corporations the activities of which are limited to holding or operating real estate, since in the case of such corporations the receivership which accompanies financial distress is almost invariably a foreclosure receivership.

(2) There is a direct conflict between the decision of the Second Circuit Court of Appeals below, which holds that a foreclosure receivership is not an "equity receivership" within the meaning of the statute, and the decision of the Circuit Court of Appeals for the Seventh Circuit in *In re*

Granada Hotel Corporation, debtor (June 3, 1935) 78 F. (2d) 409, which holds that such a foreclosure receivership is an "equity receivership."

WHEREFORE, your petitioners respectfully pray that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the Circuit Court of Appeals for the Second Circuit, commanding that court to certify and send to this Court for its review and determination on a day certain to be therein named a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket, "In the Matter of 2168 Broadway Corporation, Alleged Debtor, Duparquet Huot & Moneuse Co., E. E. Alley Co., Inc., and H. B. Day Co., Inc., Appellants," and that the said judgment of the said court may be reversed by this Honorable Court, and that your petitioners may have such other and further relief in the premises as to this Honorable Court may seem meet and just, and your petitioners will ever pray.

Dated, New York, October 15, 1935.

DUPARQUET HUOT & MONEUSE CO.,
E. E. ALLEY CO., INC., AND
H. B. DAY CO., INC.,
By HAROLD HARPER,
MARK M. HORBLIT,
Counsel for Petitioners.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935

No. 533

IN THE MATTER OF 2168 BROADWAY CORPORATION,
Debtor;

DUPARQUET HUOT & MONEUSE CO., E. E. ALLEY CO., INC., AND H. B. DAY CO., INC.,
Petitioners,

vs.

FRYSINGER EVANS, DU-WEL CLEANING CONTRACTING CO., GREENLEIGH PRINTING CO., INC. AND GRAMERCY QUALITY LAUNDRY CO., INC.,
Respondents.

BRIEF IN SUPPORT OF PETITION.

Statement.

Under subdivision (a) of §77B three creditors having claims in the jurisdictional amount may file a petition under the section, if the corporation is insolvent, or unable to meet its debts as they mature, in any one of three alternative situations: (1) if the corporation has committed an act of bankruptcy within four months, (2) if a prior

proceeding in bankruptcy is pending, and (3) if an equity receivership is pending.

The single question presented here is whether the custody of the debtor's property by receivers appointed by a State court in a suit in equity to foreclose a mortgage is a pending equity receivership within the meaning of §77B.

The district court held that it was not, and dismissed as insufficient in law a petition for corporate reorganization setting forth the existence of such a receivership but not alleging the pendency of a prior proceeding in bankruptcy or an act of bankruptcy. Its opinion, dated May 8, 1935, is found in the record (R. 17-19), and is reported 11 Fed. Supp. 404. The Second Circuit Court of Appeals affirmed the district court. Its opinion, dated July 15, 1935, is printed in the record (R. 30-34), and is reported 78 F. (2d) 678.

The date of the judgment of the Circuit Court of Appeals for the Second Circuit to be reviewed by this Court is July 22, 1935 (R. 34, 35). The allegations of the petition for reorganization, which was dismissed as insufficient in law, are summarized in the petition for certiorari.

The decision of the Second Circuit Court of Appeals is in conflict with that of the Seventh Circuit Court of Appeals in *Matter of Granada Hotel Corporation*, a case decided June 5, 1935, in which a rehearing was denied July 26, 1935. The opinion of that court is reported 78 F. (2d) 409. This decision affirmed the District Court for the Eastern District of Illinois which had sustained the petition for reorganization. The opinion of the district court, dated February 26, 1935, is reported 9 Fed. Supp. 909. The unsuccessful parties in that case are also applicants for certiorari here (No. 428).

ARGUMENT.

The custody of the debtor's property by receivers appointed by the State court in a suit in equity to foreclose a mortgage is a pending equity receivership within the meaning of Section 77B.

I. THE LANGUAGE OF THE STATUTE IMPERATIVELY REQUIRES THAT THE PRESENT RECEIVERSHIP BE HELD AN EQUITY RECEIVERSHIP.

The expression "equity receivership * * * pending," which governs this case, is not difficult or obscure. If the words are to be used in their literal significance, the logical content of the phrase cannot include more than this: (1) appointment of receivers in a suit in equity, (2) appointment of receivers by an exercise of chancery rather than statutory powers, and (3) present possession of the *res* by the receivers. While it may very well be that the statute is satisfied by the existence of less than all of these conditions, it cannot be said without a violation of language that custody of the property of a corporation by a receiver appointed in an exercise of chancery powers in a suit in equity is not an equity receivership.

A. The Present Pending Foreclosure Receivership Satisfies the Literal Requirements of the Statute.

It cannot be doubted that a suit to foreclose a mortgage is a suit in equity. Nor can it be doubted that the appointment of receivers in such a foreclosure suit is the exercise of chancery powers. It is said in Carmody's New York Practice, Vol. 8, § 1023:

> "Receivers may be appointed in foreclosure actions, but, if appointed, they are the regular equity receivers."

The author refers the reader by a footnote to Vol. 7, § 584, where it is said:

> "These receivers were appointed by the courts of chancery before any statutes were passed authorizing their appointment, and the cases in which such receivers might be had and the rules regulating their appointment and governing their conduct were well settled before the Code of Civil Procedure was adopted in 1849. The Code provisions merely codified those well-established rules, and the Civil Practice Act sections continue the law as found in the Code."

The petition alleged in the present case (R. 4) that the receivers have entered into possession, that the receivership is now in full force and effect and has not been revoked or terminated (R. 4-5), and that the debtor's "only property" is being administered by the receivers in the foreclosure suit (R. 16).

The receivership in this New York foreclosure suit thus meets all of the possible requirements of the language used in the statute.

B. The Language Is Unambiguous and Does Not Admit of Construction.

The court below has obviously added restrictions to the foregoing concept of an equity receivership by an exercise of a purported power to construe the statute. The statute, however, being unambiguous, has left no room for construction.

In *United States* v. *Mo. Pac. R. Co.* (1929), 278 U. S. 269, this Court in refusing to cut down the meaning of general language employed in the Interstate Commerce Act, which was contended to have a more restricted meaning, said (p. 277):

> "Adherence to its terms leads to nothing impossible or plainly unreasonable. We are therefore bound by

> the words employed and are not at liberty to conjure up conditions to raise doubts in order that resort may be had to construction. It is elementary that where no ambiguity exists there is no room for construction."

And again (p. 278):

> "But where the language of an enactment is clear and construction according to its terms does not lead to absurd or impracticable consequences, the words employed are to be taken as the final expression of the meaning intended."

As it was put by Sutherland, J., in *Crooks* v. *Harrelson* (1930), 282 U. S. 55, 60:

> "* * * the absurdity must be so gross as to shock the general moral or common sense. Compare *Pirie* v. *Chicago Title and Trust Company,* 182 U. S. 438, 451-452. And there must be something to make plain the intent of Congress that the letter of the statute is not to prevail. *Treat* v. *White,* 181 U. S. 264, 268."

C. Where Words of General Application Are Used the General Meaning Is Preferred to a Restricted Meaning.

Even if it be agreed that the words "equity receivership * * * pending" are subject to interpretation, the applicable canons of construction are opposed to the restriction sought to be made.

The rule is thus expressed in *Mears Mining Co.* v. *Maryland Casualty Co.,* (1912) 162 Mo. App. 178, 144 S. W. 883, 887:

> "If the statute did not expressly name any kind of insurance, but used general words, then it would cover all kinds of insurance contracts, as the rule is well established that where a statute contains general words only such general words are to receive a general construction, and the effect of them is not to be limited except by express words of the statute itself."

The rule that the wide is preferred to the narrow construction also finds expression in *Tynan* v. *Walker*, (1868) 35 Calif. 634, 642; *Abbot* v. *City of Milwaukee, et al.*, (1912) 148 Wis. 26, 134 N. W. 137; *So. Ry. Co.* v. *Machinist Local Union No. 14*, (C. C. W. D. Tenn. 1901) 111 Fed. 49, 56, 57.

The matter was thus put by the Supreme Court in *Miller* v. *Robertson*, (1924) 266 U. S. 243, 250, in holding, per Butler, J., that suits under § 9 of the Trading with the Enemy Act were not to be limited to causes of action for which an action of debt might be maintained:

> "The words of a statute are to be read in their natural and ordinary sense, giving them a meaning to their full extent and capacity, unless some strong reason to the contrary appears."

Caffey, J., said in *In re David Bell Scarves* (D. C. S. D. N. Y. 1931), 52 F. (2d) 755, 756; affirmed as *Conrad* v. *Pender*, 289 U. S. 472:

> "There must be plain and strong ground for depriving language of a statute of full operation before the court is justified in confining it to a field more restricted than that comprehended within the literal words."

D. The Legal Meaning of the Words Used Is to be Preferred to a Colloquial or Local Meaning.

Judge Swan, writing for the court below, says of the words "equity receivership" (R. 32):

> "The kind of suit to which those words are usually applied in common parlance is one commenced by a simple contract creditor praying for the conservation of the assets of a corporation insolvent in the common law sense, in which the corporation confesses the allegations of the bill and consents to the appointment of a receiver."

The reference of the court is to the "conservation" suit which, based upon an equitable estoppel upheld in *Brown* v. *Lake Superior Iron Co.* (1890), 134 U. S. 530, received a certain amount of judicial recognition in *Re Metropolitan Railway Receivership* (1908), 208 U. S. 90, was condemned as irregular in *Harkin* v. *Brundage* (1928), 276 U. S. 36, and is given some place as a suit in which an equity receiver may be appointed in *Gordon* v. *Washington* (1935), 295 U. S. 30, 79 L. Ed. 626, 631.

But the use of the words "equity receivership" as limited to this irregular and eccentric type of proceeding in the federal courts is obviously a colloquialism. Furthermore, as pointed out in the case of *In re Laclede Gas Light Co.* (D. C., E. D. Mo. 1934 not officially reported, C. C. H. Bankruptcy Law Service, Par. 3001), this type of proceeding, except as to railroads, has been limited to the eastern seaboard. Words having a definite legal significance when used in a statute of national application should not be assigned a colloquial meaning, and still less a meaning unknown in a portion of the country over which the statute is to operate.

As was said in *Westerlund* v. *Black Bear Mining Co.* (8th C. C. A. 1913), 203 Fed. 599, 605:

> "A decisive canon of construction here, however, is that when a word which has a known legal meaning is used in a statute it must be assumed that the term is used in its legal sense, in the absence of an indication of a contrary intent. *The Abbotsford,* 98 U. S. 440, 444, 25 L. Ed. 168; *McCool* v. *Smith,* 1 Black (U. S.) 459, 464, 470, 17 L. Ed. 218; *United States* v. *Gilmore,* 8 Wall. 330, 19 L. Ed. 396."

II. THE REASONS OF THE COURT BELOW FOR REJECTING THE LITERAL AND LEGAL MEANING OF THE WORDS "EQUITY RECEIVERSHIP * * * PENDING" ARE INVALID.

A. Resort to the Congressional Debates is Improper.

The learned court below concedes that it is rejecting the literal meaning of the statute and accepting a colloquial one. It says (R. 32, 33):

> "It cannot be gainsaid that an action to foreclose a mortgage is a suit in equity, or that the receiver appointed in such a suit to conserve the mortgaged property and collect the rents pending foreclosure may properly be called a receiver in equity."

Nevertheless, the Court limits the generality of the statute to the equity receivership found in a single type of proceeding, the "conservation suit", because "the debates in Congress during the progress of the bill, although not affording any conclusive evidence of the meaning of the words in question, indicate that the legislators were thoroughly familiar with this type of receivership. See 78 Cong. Rec. 7890, 7905-7" (R. 33). But resort to such an external source for the meaning of words which are unambiguous and have an accepted legal significance is a violation of the rule established by decisions of this Court.

In *Caminetti* v. *United States* (1917) 242 U. S. 470, 490, it was said by Day, J. (p. 490):

> "But, as we have already said, and it has been so often affirmed as to become a recognized rule, when words are free from doubt they must be taken as the final expression of the legislative intent, and are not to be added to or subtracted from by considerations drawn from titles or designating names or reports accompanying their introduction, or from any extraneous source. In other words, the language being plain, and not leading to absurd or wholly impracticable consequences, it is the sole evidence of the ultimate legislative intent. See *Mackenzie* v. *Hare*, 239 U. S. 299, 308."

The following extract from the opinion of McKenna, J., in *Mackenzie* v. *Hare*, (1915) 239 U. S. 299, 308, is most pertinent:

> "The act is therefore explicit and circumstantial. It would transcend judicial power to insert limitations or conditions upon disputable considerations of reasons which impelled the law, or of conditions to which it might be conjectured it was addressed and intended to accommodate.
>
> "Whatever was said in the debates on the bill or in the reports concerning it, preceding its enactment or during its enactment, must give way to its language, or, rather, all the reasons that induced its enactment and all of its purposes must be supposed to be satisfied and expressed by its words, and it makes no difference that in discussion some may have been given more prominence than others, seemed more urgent and insistent than others, presented the mischief intended to be remedied more conspicuously than others."

To the same effect are *Pennsylvania Railroad Company* v. *International Coal Company* (1913) 230 U. S. 184, 199; *United States* v. *Freight Association* (1897) 166 U. S. 290, 318; *United States* v. *Mo. Pac. R. Co.* (1929) 278 U. S. 269, 278.

B. The Argument That the Equity Receivership Contemplated Is Only Such as Is Similar to a Proceeding in Bankruptcy Is Invalid.

The language is "if a prior proceeding in bankruptcy or equity receivership is not pending, that it has committed an act of bankruptcy within four months" (Subd. a, § 77B).

The Circuit Court of Appeals (R. 33), as did the District Court (R. 18), rested its decision upon the supposed use of the words under interpretation in apposition to " a prior proceeding in bankruptcy". The word "prior", however,

modifies "proceeding in bankruptcy" alone. Its use obviously is to distinguish between an earlier bankruptcy proceeding and the reorganization proceeding itself, which, being brought under the bankruptcy act, is also a "proceeding in bankruptcy."

There is, moreover, no such thing as "a *proceeding* in equity receivership". A suit that looks merely to the appointment of an equity receiver must be dismissed. *Gordon* v. *Washington* (April 1, (1935) 295 U. S. 30, 79 L. Ed. 626; *U. S.* v. *Sloan Shipyards* (D. C. W. D. Wash. N. D. 1920) 270 Fed. 613; *Central West Public Service Co.* v. *Craig* (8th C. C. A. 1934) 70 F. (2d) 427, 432; *Zuber* v. *Micmac Gold Mining Co.* (C. C. Me. 1910) 180 Fed. 625, 627.

In the case first cited this Court said, per Stone, J. (p. 37):

> "A receivership is only a means to reach some legitimate end sought through the exercise of the power of a court of equity. It is not an end in itself. Where a final decree involving the disposition of property is appropriately asked, the court in its discretion may appoint a receiver to preserve and protect the property pending its final disposition."

In the *Central West* case, *supra*, the Eighth Circuit Court of Appeals said (p. 432):

> "The appointment of a receiver is an ancillary, an incidental remedy only, and is not final relief nor is it properly the end or object of the litigation, but is a remedy allowable only in connection with a suit pending for some other purpose in which there is a prayer for ultimate relief which the court has jurisdiction to grant, and to which the appointment of the receiver is an aid."

Equity receiverships do not differ as between themselves. They can only be classified with reference to the primary objects of the bills to which they are auxiliary, and to the ultimate relief sought. While the order appointing one receiver may give powers denied to another for the purpose of accomplishing some object of the suit, or some necessity of the situation, there is no "quality" (to use the language of the District Court, R. 17) possessed by one receiver that is not possessed by all. They all hold the *res pendente lite* for the ultimate determination of its disposition by the court.

Hence the word "proceeding" cannot be attached to the words "equity receivership," and it cannot be said that the statute is limited to "a prior proceeding in equity receivership" which is to be assimilated to "a prior proceeding in bankruptcy." The only words to be interpreted are "equity receivership * * * pending."

In *Bryan* v. *Welch* (10th C. C. A. 1935) 74 F. (2d) 964, the receivership was not for the purpose of winding up the affairs of the corporation, but for temporarily operating the business, and it was expressly directed by the court when the receiver was appointed, that the assets be turned over to the new corporate management when a suitable one was established. Although not for liquidation and not an act of bankruptcy, the court, by Phillips, C. J., said (p. 970):

> "We conclude that the State court receivership was an equity receivership within the meaning of 77B."

The Tenth Circuit, therefore, must be aligned with the Seventh rather than the Second upon the present question.

C. ADHERENCE TO THE LEGAL AND LITERAL MEANING OF THE STATUTE DOES NOT LEAD TO ABSURD AND IMPRACTICAL CONSEQUENCES.

This is the only exigency in which departure from the accepted meaning of the statute's terms is permissible.

United States v. *Mo. Pac. R. Co., supra;*

Echols v. *Commissioner of Internal Revenue* (8th C. C. A. 1932) 61 F. (2d) 191;

The Samuel E. Spring (D. C. D. Mass. 1886) 27 Fed. 764, 766;

Farmers Loan & Trust Company v. *Oregon & C. Ry. Co.* (D. C. D. Ore. 1885) 24 Fed. 407, 410;

Chicago Home for Girls v. *Carr* (1921) 300 Ill. 478, 483, 133 N. E. 344, 346-347.

"The absurdity must be so gross as to shock the general moral or common sense." *Crooks* v. *Harrelson, supra.*

The opinion below argues (R. 33):

> "We cannot think that Congress intended to give three creditors having claims totaling as little as $1,000, the right to force a corporation into a reorganization, if a receiver were appointed in the foreclosure of a mortgage covering any of its property. Situations may well be imagined in which a corporation might allow a mortgage on part of its land or on a chattel to be foreclosed, with the appointment of a receiver pending foreclosure, without being in any need of a reorganization. We do not believe that it was the purpose of Congress to permit every foreclosure proceeding in which a receiver might be appointed to be superseded by an involuntary reorganization."

This argument, however, completely ignores other provisions of the statute. If "equity receivership" is given its literal and legal meaning that does not permit "every fore-

closure proceeding in which a receiver might be appointed to be superseded by an involuntary reorganization." Such a result can follow only if the corporation is (1) insolvent, or (2) unable to meet its debts as they mature, and if the petition is filed in good faith (Section 77B, subd. a). With these safeguards against the haphazard or unscrupulous use of the involuntary petition for reorganization, there is no reason why the right to file such a petition should not follow the existence of a mortgage foreclosure receivership. The foreclosure of any portion of a corporation's property is usually a symptom of financial distress. When accompanied by the corporation's insolvency or inability to meet its debts as they mature, the creditors of the corporation should be permitted to avert the disaster and set in motion the machinery of reorganization. They should not be left to the mercy of the debtor's own board of directors which through deadlock, lack of direct interest, ulterior motives or mere indolence, may be unable or unwilling to help them. At least the existence of such a remedy is not so absurd as to shock the general moral or common sense.

III. THE STATUTE FURNISHES ITS OWN DEFINITION OF "EQUITY RECEIVERSHIP • • • PENDING," WHICH IS IN ACCORD WITH THE LITERAL MEANING AND FULL OPERATION OF THOSE WORDS.

Subdivision (i) quoted above, provides expressly that a petition may be filed under this section by the corporation's creditors "as provided in subdivision (a) of this section," "if a receiver or trustee of all or any part of the property of a corporation has been appointed by a federal, state or territorial court." This language is also plain and unambiguous, and affords to the creditors a right to petition under the section: (1) whether the appointment

is over all, or only a part of the property, and (2) whether the appointment is by a federal, state or territorial court. This plain language precludes the interpretation that the appointment of a receiver of the property in foreclosure is not within the statute, or that the statute must be limited to a receivership pending in the federal court (as respondents contended in the district court).

True, the petition may be filed "as provided in subdivision (a)." The fair interpretation of this phrase is that to the requirement of the "pending" receivership, defined by this subdivision, must be added the other requirements of subdivision (a), to wit: that the creditors shall be three in number, that their claims aggregate $1,000, and that the corporation shall be either insolvent or unable to meet its debts as they mature. It cannot be said that the provision that a petition may be filed "as provided in subdivision (a)" also requires the allegation of an act of bankruptcy or the existence of a prior proceeding in bankruptcy, or of the pendency of an equity receivership other than as defined in subdivision (i). The words quoted above from subdivision (i) would, under such construction, be bereft of all significance and might as well be stricken from the statute as redundant.

The learned court below considered this provision of subdivision (i) "contemplates a situation where the corporation may have property outside the jurisdiction of the appointing court, in which case only part of its property could be in equity receivership without ancillary proceedings" (R. 34).

But if all that Congress meant was that the creditors might petition if an equity receivership existed in another jurisdiction, it would have been easy enough to say "if a receiver or trustee of the property of a corporation has been appointed in any jurisdiction by a federal, state or

territorial court." Congress, however, did not say that. It said "if a receiver or trustee of all or any part of the property of a corporation has been appointed by a federal, state or territorial court." The universality of the latter proposition, under the authorities already cited, cannot be limited to the narrow confines of the former. Certainly it cannot be so done without good reason. Besides, conservation suits are ordinarily commenced where the principal office of the corporation is situated, and so ordinarily are reorganization proceedings. The language in question can hardly be construed as having been adopted merely for the purpose of enabling creditors to institute the reorganization proceedings in a jurisdiction other than that in which the equity receivership or the conservation suit is pending.

IV. THE DECISION OF THE SEVENTH CIRCUIT COURT OF APPEALS RESTS UPON A MORE LOGICAL BASIS.

The decision of the Second Circuit Court of Appeals below is exactly the opposite of the decision of the Seventh Circuit Court of Appeals in *In re Granada Hotel Corporation* (June 5, 1935), 78 F. (2d) 409, which affirmed the decision of the District Court for the Eastern District of Illinois (February 26, 1935) 9 Fed. Supp. 909. That case, in which an application for certiorari has also been made to this Court (No. 428), includes an additional question not involved here, *i. e.;* whether custody of the property under order of the court by a mortgage trustee, and not by a receiver selected by the court, constitutes a receivership.

The opinions both of the Circuit Court of Appeals and of the district court in that case give more emphasis to that feature of the case. They plainly show, however, that the instant question not only was necessarily decided but

was considered by both courts. Indeed, in an application for rehearing to the Circuit Court of Appeals the decision below was urged as a reason for change in its decision. Rehearing, however, was denied on July 16, 1935.

The views of Judge Lindley, whose decision was affirmed, are clearly set forth in another case, *Matter of Surf Building Corporation* (D. C., E. D. Ill., October, 1934, not officially reported), C. C. H. Bankruptcy Law Service, Paragraph 3076, where he said in part:

> "It may be well to comment upon one or two contentions submitted by the respondents. It is insisted that an equity receivership, growing out of a foreclosure proceeding which vests in the receiver of a court of equity the custody and possession of all the assets of the corporation, is not an equity receivership within the meaning of the statute. I have already said in other cases, probably so often as justly to be accused of tiresome reiteration, that a receivership in equity is always incidental to some other ultimate purpose; that equity jurisprudence recognizes no such proceedings as one which has for its only prayer for relief, receivership, but that all receivers in equity are appointed, whether in dissolution of partnerships, in mortgage foreclosure or upon creditors' petition, in subordination of and incidental to the main purpose of the litigation. This court is of the opinion that Congress did not intend, by the provisions of 77-B, to limit jurisdiction under that section to equity receiverships other than those in foreclosure cases. To do so would be to defeat the purpose of the Act in a very important branch of equity jurisdiction."

Respondents below relied upon *In re Laclede Gas Light Co.* (D. C., E. D. Mo. June 26, 1934, not officially reported) C. C. H. Bankruptcy Law Service, Paragraph 3001. Certain remarks there are in accordance with the decision reached below. They were not at all necessary, however,

to the decision, since in that case it appeared that no receiver whatever had been appointed at the time the petition for reorganization was filed. This also was the situation in *In re Broadway-Barclay Corporation* (2d C. C. A. July 15, 1935) 78 F. (2d) 680, decided by the court below simultaneously with its decision herein. For the reason stated, these cases are plainly distinguishable.

The other decision in the District Court for the Southern District of New York, *In re Draco Realty Corporation* (June 3, 1935) 11 Fed. Supp. 405, was rendered after the decision in the District Court below and was, therefore, compelled by the rule *stare decisis*.

The decisions of Judge Lindley in *In re Flamingo Hotel Co.* (August 9, 1934, not officially reported) and *In re Surf Building Corporation, supra,* support this brief.

V. THE WORDS "EQUITY RECEIVERSHIP" SHOULD NOT BE JUDICIALLY RESTRICTED.

A. This Is a Remedial Statute Requiring a Liberal Construction to Accomplish the Relief Intended by Congress.

The National Bankruptcy Act as a whole must be construed liberally. In *Continental Ill. Nat. B. & T. Co.* v. *C. R. I. & P. R. Co.* (1935) 294 U. S. 648, 668, 79 L. Ed. 642, 651, this Court in dealing with the companion § 77 said, per Sutherland, J.:

> "From the beginning, the tendency of legislation and of judicial interpretation has been uniformly in the direction of progressive liberalization in respect of the operation of the bankruptcy power."

In dealing with § 77B itself, the Fourth Circuit Court of Appeals in *Campbell* v. *Allegheny Corporation* (1935) 75 F. (2d) 947, 950, said, per Parker, C. J.:

> "The statute is of a remedial character, designed to facilitate the reorganization of corporate business made necessary by the economic depression through which the country has been passing. Its purpose should be forwarded by a fair and liberal construction of its provisions, not thwarted by any narrow or technical interpretation, and certainly not by reading into its language conditions and limitations which the lawmakers themselves did not see fit to express."

B. A Purpose of the Statute Was to Enable the Debtor and Its Creditors to Avoid, if Possible, the Sacrifice and Expense Involved in Foreclosure Sales.

In upholding the constitutionality of the companion section, § 77, the Supreme Court in *Continental Ill. Nat. B. & T. Co.* v. *C. R. I. & P. R. Co.* (1935) 294 U. S. 648, 685, 79 L. Ed. 642, 660, said:

> "The delay and expense incident to railroad receiverships and foreclosure sales constituted, probably, the chief reasons which induced the passage of § 77; and to permit the perpetration of either of these evils under this new legislation would be subversive of the spirit in which it was conceived and adopted."

Something of the same thought with relation to § 77B was expressed by Judge Lindley in his decision in the *Granada* case, 9 Fed. Supp. 909, which was affirmed by the Seventh Circuit Court of Appeals:

> "As the court has previously pointed out, the intent of Congress apparently was to give the holders of bonds in default an opportunity to have property securing their bonds reorganized in the federal court in lieu of liquidation under foreclosure in either the state or federal court."

If it was the intention of Congress to permit the holders of bonds in default to avoid the expense of foreclosure by having their property reorganized under § 77B, *a fortiori* it is the right of general creditors, whose equities in a valuable property will be wiped out by the sale of the property under a small mortgage, to have the court assume jurisdiction, and thus to have an opportunity to seek to finance the mortgage and to prevent its foreclosure. This does not lead to any unjust, oppressive or absurd result. On the contrary, it affords an opportunity which is just, fair and reasonable.

The argument of the court below comes down to this, that an equity receivership of the entire property of the debtor is an "equity receivership" if the ultimate purpose of the suit is a ratable distribution of the assets among the creditors secured and unsecured, but it is not an "equity receivership" if the ultimate object is the application of the property to the satisfaction of a secured creditor or, as often happens in the case of mortgage bonds, a class of secured creditors. It is impossible to discern any legislative purpose in such a distinction. Surely the legislature could not have intended that creditors could interrupt the course of a proceeding seeking a ratable distribution of the assets among all creditors and could not interrupt the sacrifice of the property in the interest of one secured creditor or class of creditors.

Conclusion.

The literal and legal meaning of "equity receivership * * * pending" does not involve any particular ultimate relief. It is merely the description of a condition which may exist in many types of equity suits in which, pending ultimate disposition, the court has temporarily placed the property of the debtor in the hands of its custo-

dian. Departure from the literal and legal meaning of "equity receivership * * * pending," in favor of a local, colloquial or otherwise restricted meaning can only be justified if adherence to the literal and legal meaning involves oppression, injustice or absurdity. In the present case it is the restricted and colloquial meaning which involves injustice and absurdity, and the literal and legal meaning which is in accord with the purposes of the act, and with the liberal construction to which it is entitled as a remedial statute. The view of the Circuit Court of Appeals for the Seventh Circuit should be accepted.

A WRIT OF CERTIORARI SHOULD BE GRANTED, AND THIS COURT SHOULD REVIEW THE DECISION OF THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND FINALLY REVERSE IT.

Dated, New York, October 15, 1935.

Respectfully submitted,

HAROLD HARPER,
MARK M. HORBLIT,
Counsel for Petitioners.

(7016-C)

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CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1935.

No. 533.

DUPARQUET HUOT & MONEUSE CO., E. E. ALLEY CO., INC., and H. B. DAY CO., INC.,

Petitioners,

vs.

FRYSINGER EVANS, DU-WEL CLEANING CONTRACTING CO., GREENLEIGH PRINTING CO., INC., and GRAMERCY QUALITY LAUNDRY CO., INC.

BRIEF FOR PETITIONERS.

HAROLD HARPER,
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BRIEF FOR PETITIONERS.

Statement.

This court on November 25, 1935 (R., 23), granted certiorari to the Circuit Court of Appeals for the Second Circuit, which on July 22, 1935 (R., 21-22), had affirmed an order of the District Court for the Southern District of New York, dated May 13, 1935 (R., 12-13), dismissing as insufficient in law the petition of three creditors for the reorganization of a corporate debtor under § 77B of the Bankruptcy Act.

The opinion of the District Court (Knox, D. J.), dated May 8, 1935 (R., 10-11), is reported 11 Fed. Supp. 404,

and that of the Circuit Court of Appeals (Swan, C. J.), dated July 15, 1935 (R., 17-21), is reported 78 Fed. [2d] 678. The jurisdiction of this court was invoked under subdivision (a) of § 240 of the Judicial Code (28 U. S. C. 347).

The cause involves the construction of subdivisions (a) and (i) of § 77B of the Bankruptcy Act (11 U. S. C. 207), the material portions of which are set forth in the appendix.

The question is whether possession of the corporate debtor's property by receivers appointed in a suit in equity to foreclose a real estate mortgage is an "equity receivership" within the meaning of subdivision (a) of § 77B of the Bankruptcy Act. As the District Court dismissed the petition for reorganization upon motion without a hearing on the merits, only the allegations of the petition are relevant.

THE PETITION FOR REORGANIZATION.

The petitioners below were three unsecured creditors of the debtor who had provable claims amounting in the aggregate, in excess of the value of securities held by them, to more than $1,000 (R., 1-3). Their petition alleged that the debtor was eligible to bankruptcy under § 4 of the Bankruptcy Act (R., 1); that during the six months preceding the debtor had had its principal place of business in the Southern District of New York (R., 3); that it was unable to meet its debts as they matured (R., 3); that petitioners proposed that the debtor should effect a reorganization under § 77B (R., 3), and that no prior proceeding was pending for the relief sought (R., 5).

The petition also contained, among others, the following allegations (R., 3):

> "Heretofore and on or about October 15, 1934, by the service of a summons and complaint and the filing of a lis pendens, an action was commenced in the Supreme Court of the State of New York, County of New York, by Gertrude C. Buttenweiser against the debtor, to foreclose a mortgage in the principal

sum of $42,500 held by the said Buttenweiser on the property of the said debtor. The complaint in said action alleged the debtor's default in payment of interest on said mortgage, which said mortgage matured on September 19, 1934. Thereafter, and on or about December 19, 1934, by order of said Supreme Court receivers of the said property of the said debtor were appointed in said action. Said receivers entered into possession of and now hold the said property and are receiving and administering the income therefrom for the benefit of the said plaintiff in said action. Said receivership is now in full force and effect and has not been revoked or terminated."

And (R., p. 4):

> "The debtor is unable to meet its matured and maturing obligations. It has defaulted in the payment of interest and principal upon a mortgage in the amount of $42,500, which matured on September 19, 1934. The total value of its assets taken at values reflected by current market conditions, exceeds the total amount of its liabilities, but said value cannot be immediately realized without great sacrifice. *Its only property is being administered by receivers in the foreclosure action hereinbefore mentioned.* Other creditors of the corporation are pressing for payment of their respective claims. The debtor is in arrears in New York municipal taxes approximating $260,000" (Italics ours).

The petition further alleged that the assets of the debtor were of great value (R., 4); that the property of the debtor formerly secured a mortgage in the amount of $1,650,000, and that its assessed valuation exceeded $1,500,000 (R., 5); that, under present market and financial conditions, a forced sale would cause unnecessary loss to lienors, creditors and others in interest; that the debtor maintained and operated on the premises the hotel "Manhattan Towers"; that the debtor's business was in serious danger of deterioration and loss by virtue of the pending foreclosure action and the pressure of other creditors; that if a plan of reorgani-

zation could be effected it would result in a great saving of the assets of the debtor which would redound to the benefit of its creditors and stockholders (R., 4); that if the debtor's assets were safely conserved and managed, they would ultimately be sufficient to satisfy all creditors in full (R., 5); that it was essential for the protection of the interests of the stockholders and creditors that a forced liquidation of the debtor's assets be avoided, and all creditors be restrained from prosecuting their claims except in the reorganization proceedings; that such a liquidation would be accomplished if the foreclosure action should result in a sale pursuant to the judgment to be obtained in that action; and that the property if sold at this time would bring but little to the estate because of the present depression in the real estate market (R., 5).

The petition concluded with the prayer that the court approve the petition, assume jurisdiction and appoint a trustee, and that petitioners be permitted to submit a plan for reorganization (R., 5-6).

A schedule annexed to the petition, which only purported to be an approximation, showed assets of $1,500,000 and liabilities of $392,385.04 (R., 7).

QUESTION.

The petition did not allege that the debtor had committed an act of bankruptcy within four months, nor that a prior proceeding in bankruptcy was pending. It did allege that the debtor's property was in custody of receivers appointed by the state court in a suit in equity to foreclose a mortgage. The sole question presented is whether this constituted an "equity receivership * * * pending," which is an alternative requirement of § 77B.

The Circuit Court of Appeals is in agreement as to the question presented. It said (R., 18):

> "Upon motion of other creditors of the debtor corporation the District Court dismissed the petition

on the ground that a mortgage foreclosure suit, in which receivers have been appointed, is not an 'equity receivership' within the meaning of Section 77B. The correctness of this construction is the sole question presented."

DISTINCTION FROM OTHER CASES.

The present case differs from *In re Granada Hotel Corporation* (7th C. C. A. June 5, 1935, rehearing denied July 26, 1935) 78 Fed. [2d] 409, which is before this Court *sub nomine Tuttle* v. *Harris,* No. 428, in that in the present case receivers of the court's own selection were in charge at the filing of the petition, whereas in the *Granada* case, prior to the filing of the petition under § 77B, the state court had discharged the receiver appointed in a suit to foreclose the second mortgage and had placed the first mortgage trustee in possession of the property under the terms of the trust deed. The Seventh Circuit Court of Appeals *sustained* the creditors' petition for reorganization.

The present case differs from *In re Broadway-Barclay Corporation* (2d C. C. A. July 15, 1935) 78 Fed. [2d] 680, decided by the court below simultaneously with its decision herein, in that receivers had actually been appointed and taken possession in this case, whereas in that case a foreclosure action was pending but no receivers had been appointed. It differs in the same respect from *In re Laclede Gas Light Co.* (D. C., E. D. Mo. June 26, 1934, not officially reported) C. C. H. Bankruptcy Law Service, Paragraph 3001.

Specifications of Error.

1. The Circuit Court of Appeals for the Second Circuit erred in affirming the order of the District Court which dismissed the petition for reorganization as insufficient in law.

2. The said Circuit Court of Appeals erred in holding that custody of the debtor's property by receivers appointed

by a state court in a suit in equity to foreclose a mortgage was not an "equity receivership" within the meaning of subdivision (a) of § 77B of the Bankruptcy Act.

ARGUMENT.

The custody of the debtor's property by receivers appointed by the state court in a suit in equity to foreclose a mortgage is a pending equity receivership within the meaning of Section 77B of the Bankruptcy Act.

SUMMARY

The words "equity receivership" are clear and unambiguous and have a definite legal meaning which includes a receivership in mortgage foreclosure. Judicial limitation of the expression "equity receivership" to receiverships in so-called "conservation suits" is not warranted. If the canons of construction are summoned, they require that statutory language be given the widest and not the narrowest significance, and that the legal meaning rather than any merely colloquial or local meaning be attached. Indeed, it may well be said that the language is so plain as not to be open to construction and, under well settled principles, it cannot be denied or limited unless the literal or legal meaning leads to impractical or absurd results.

The suggestion that a small part only of the debtor corporation's property may be affected by a foreclosure receivership and its financial position not at all, is met by the additional requirements for a creditor's petition that the corporation must be insolvent or unable to meet its debts as they mature, and that the petition must be filed in good faith.

To the contention that the debates in Congress show that it was receivership in "conservation suits" which indi-

vidual legislators contemplated, it may be answered that there is nothing in those debates to show that the Congress intended to *limit* the generality of "equity receivership" to receiverships in this particular type of suit, and in any event the language of the statute must be accepted as the final expression of legislative intention.

The association of "equity receivership" in the statute with "a prior proceeding in bankruptcy," does not require the assimilation of "equity receivership" to a bankruptcy proceeding. There is no such thing as "a proceeding in equity receivership," and a solecism may not be attributed to Congress merely for the purpose of creating an ambiguity where none would otherwise exist. The expressed purpose of the statute, and its association with other statutes designed to relieve depression and promote economic recovery, stamp it as remedial in character and require liberal interpretation. No legislative purpose can be discerned in excluding from reorganization at the behest of creditors the many solvent real estate corporations as to which a mortgage foreclosure receivership rather than a "conservation" receivership is characteristic of business distress.

POINT I.

The language of the statute imperatively requires that the present receivership be held an equity receivership.

A. The present pending foreclosure receivership satisfies the literal requirements of the statute.

Under subdivision (a) of § 77B three creditors having claims in the jurisdictional amount may file a petition under the section, if the corporation is insolvent, or unable to meet its debts as they mature, in any one of three alternative situations: (1) if the corporation has committed an act of bankruptcy within four months, (2) if a prior pro-

ceeding in bankruptcy is pending, and (3) if an equity receivership is pending.

Clark on Receivers thus defines the term "equity receiver" (2d Ed. 1929) § 713.

> "Equity or Equitable Receiver of Corporation.
>
> * * * *
>
> "The term equity or equitable or chancery receiver in its generally accepted sense means an officer appointed by the court to hold property in litigation pending suit or at times to hold property after judgment."
>
> * * * *

The expression "equity receivership * * * pending," which governs this case, is not difficult or obscure. If the words are read in their literal significance, the logical content of the phrase cannot include more than this: (1) appointment of receivers in a suit in equity, (2) appointment of receivers by an exercise of chancery rather than statutory powers, and (3) present possession of the *res* by the receivers. While it may very well be that the statute is satisfied by the existence of less than all of these conditions, it cannot be said without a violation of language that custody of the property of a corporation by a receiver appointed in an exercise of chancery powers in a suit in equity is not an equity receivership.

It cannot be doubted that a suit to foreclose a mortgage is a suit in equity. The appointment of receivers in such a foreclosure suit is the exercise of chancery powers. *New York Title & Mtge. Co.* v. *Polk Arms, Inc.,* (1933) 262 N. Y. 21.

It is said in Carmody's New York Practice, Vol. 8, § 1023:

> "Receivers may be appointed in foreclosure actions, but, if appointed, they are the regular equity receivers."

The author refers the reader by a footnote to Vol 7, § 584, where it is said:

> "These receivers were appointed by the courts of chancery before any statutes were passed authorizing their appointment, and the cases in which such receivers might be had and the rules regulating their appointment and governing their conduct were well settled before the Code of Civil Procedure was adopted in 1849. The Code provisions merely codified those well-established rules, and the Civil Practice Act sections continue the law as found in the Code."

The petition alleged in the present case that the receivers have entered into possession, that the receivership is now in full force and effect and has not been revoked or terminated (R., 3), and that the debtor's "only property" is being administered by the receivers in the foreclosure suit (R., 4).

The receivership in this New York foreclosure suit thus meets all of the possible requirements of the language used in the statute.

B. The language of the statute is unambiguous and does not admit of construction.

The court below has obviously added restrictions to the legal concept of an equity receivership by an exercise of a purported power to construe the statute. The statute, however, being unambiguous, has left no room for construction.

In *United States* v. *Mo. Pac. R. Co.* (1929), 278 U. S. 269, this Court in refusing to cut down the effect of general language employed in the Interstate Commerce Act, which was contended to have a more restricted meaning, said (p. 277):

> "Adherence to its terms leads to nothing impossible or plainly unreasonable. We are therefore bound by the words employed and are not at liberty to conjure up conditions to raise doubts in order that

> resort may be had to construction. It is elementary that where no ambiguity exists there is no room for construction."

And again (p. 278):

> "But where the language of an enactment is clear and construction according to its terms does not lead to absurd or impracticable consequences, the words employed are to be taken as the final expression of the meaning intended."

As it was put by Sutherland, J., in *Crooks* v. *Harrelson* (1930), 282 U. S. 55, 60:

> "* * * the absurdity must be so gross as to shock the general moral or common sense. Compare *Pirie* v. *Chicago Title and Trust Company,* 182 U. S. 438, 451-452. And there must be something to make plain the intent of Congress that the letter of the statute is not to prevail. *Treat* v. *White,* 181 U. S. 264, 268."

C. Where words of general application are used the general meaning is preferred to a restricted meaning.

Even if it be agreed that the words "equity receivership * * * pending" are subject to interpretation, the applicable canons of construction are opposed to the restriction sought to be made.

The rule that the wide is preferred to the narrow construction finds expression in *Mears Mining Co.* v. *Maryland Casualty Co.,* (1912) 162 Mo. App. 178, 144 S. W. 883, 887; *Tynan* v. *Walker,* (1868) 35 Calif. 634, 642; *Abbot* v. *City of Milwaukee, et al.,* (1912) 148 Wis. 26, 134 N. W. 137, and *So. Ry. Co.* v. *Machinist Local Union No. 14,* (C. C. W. D. Tenn. 1901) 111 Fed. 49, 56, 57.

The matter was thus put by the Supreme Court in *Miller* v. *Robertson,* (1924) 266 U. S. 243, 250, in holding, per Butler, J., that suits under § 9 of the Trading with the Enemy Act were not to be limited to causes of action for which an action of debt might be maintained:

> "The words of a statute are to be read in their natural and ordinary sense, giving them a meaning to their full extent and capacity, unless some strong reason to the contrary appears."

Caffey, J., said in *In re David Bell Scarves* (D. C. S. D. N. Y. 1931), 52 Fed. [2d] 755, 756; affirmed as *Conrad* v. *Pender*, 289 U. S. 472:

> "There must be plain and strong ground for depriving language of a statute of full operation before the court is justified in confining it to a field more restricted than that comprehended within the literal words."

D. The legal meaning of the words used is to be preferred to a colloquial or local meaning.

Judge Swan, writing for the court below, says of the words "equity receivership" (R., 19):

> "The kind of suit to which those words are usually applied in common parlance is one commenced by a simple contract creditor praying for the conservation of the assets of a corporation insolvent in the common law sense, in which the corporation confesses the allegations of the bill and consents to the appointment of a receiver."

The reference of the court is to the "conservation" suit which, based upon an equitable estoppel upheld in *Brown* v. *Lake Superior Iron Co.* (1890), 134 U. S. 530, received a certain amount of judicial recognition in *Re Metropolitan Railway Receivership* (1908), 208 U. S. 90, was condemned as irregular in *Harkin* v. *Brundage* (1928), 276 U. S. 36, was treated as a legitimate object of suspicion in *Shapiro* v. *Wilgus* (1932), 287 U. S. 348, 356, and is mentioned as a suit in which an equity receiver may be appointed in *Gordon* v. *Washington* (1935), 295 U. S. 30.

But the use of the words "equity receivership" as limited to this irregular and eccentric type of proceeding in

the federal courts is obviously a colloquialism. Furthermore, as pointed out in the case of *In re Laclede Gas Light Co.* (D. C., E. D. Mo. 1934 not officially reported) C. C. H. Bankruptcy Law Service, Par. 3001, this type of proceeding, except as to railroads, has been limited to the eastern seaboard. Words having a definite legal significance when used in a statute of national application should not be assigned a colloquial meaning, and still less a meaning unknown in a portion of the country over which the statute is to operate.

As was said in *Westerlund* v. *Black Bear Mining Co.* (8th C. C. A. 1913), 203 Fed. 599, 605:

> "A decisive canon of construction here, however, is that when a word which has a known legal meaning is used in a statute it must be assumed that the term is used in its legal sense, in the absence of an indication of a contrary intent. *The Abbotsford,* 98 U. S. 440, 444, 25 L. Ed. 168; *McCool* v. *Smith,* 1 Black (U. S.) 459, 464, 470, 17 L. Ed. 218; *United States* v. *Gilmore,* 8 Wall. 330, 19 L. Ed. 396."

POINT II.

The reasons of the Court below for rejecting the literal and legal meaning of the words "equity receivership * * * pending" are invalid.

A. Resort to the Congressional debates is improper.

The learned court below concedes that it is rejecting the literal meaning of the statute and accepting a colloquial one. It says (R., 19):

> "It cannot be gainsaid that an action to foreclose a mortgage is a suit in equity, or that the receiver appointed in such a suit to conserve the mortgaged property and collect the rents pending foreclosure may properly be called a receiver in equity."

Nevertheless, the Court limits the generality of the statute to the equity receivership found in a single type of proceeding, the "conservation suit", because "the debates in Congress during the progress of the bill, although not affording any conclusive evidence of the meaning of the words in question, indicate that the legislators were thoroughly familiar with this type of receivership. See 78 Cong. Rec., 7890, 7905-7" (R., 20).

It is no doubt true that some of the legislators at least were thoroughly familiar with the "conservation suit", although this does not appear from the particular references to the Congressional Record made by Judge Swan. The Congressional Record will be searched in vain, however, for any indication that the legislators intended to *limit* the generality of the words "equity receivership" to receiverships in "conservation suits." The words "and, if a prior proceeding in bankruptcy or equity receivership is not pending," were added by amendment in the Senate on May 2, 1934, at the motion of Senator Hastings, after the bill had been reported out of committee, and were agreed to without objection or debate (78 Cong. Rec., 7889). Nor does it appear that they were subsequently discussed.

But resort to such an external source for the meaning of words which are unambiguous and have an accepted legal significance is a violation of the rule established by decisions of this Court. *Caminetti* v. *United States* (1917) 242 U. S. 470, 490; *Pennsylvania Railroad Company* v. *International Coal Company* (1913) 230 U. S. 184, 199; *United States* v. *Freight Association* (1897) 166 U. S. 290, 318; *United States* v. *Mo. Pac. R. Co.* (1929) 278 U. S. 269, 278.

The following extract from the opinion of McKenna, J., in *Mackenzie* v. *Hare* (1915) 239 U. S. 299, 308, is most pertinent:

> "It would transcend judicial power to insert limitations or conditions upon disputable considerations of reasons which impelled the law, or of conditions to which it might be conjectured it was addressed and intended to accommodate.

> "Whatever was said in the debates on the bill or in the reports concerning it, preceding its enactment or during its enactment, must give way to its language, or, rather, all the reasons that induced its enactment and all of its purposes must be supposed to be satisfied and expressed by its words, and it makes no difference that in discussion some may have been given more prominence than others, seemed more urgent and insistent than others, presented the mischief intended to be remedied more conspicuously than others."

B. The argument that the equity receivership contemplated is only such as is similar to a proceeding in bankruptcy is invalid.

The language is "if a prior proceeding in bankruptcy or equity receivership is not pending, that it has committed an act of bankruptcy within four months" (Subd. a, § 77B).

(1) The Circuit Court of Appeals (R., 20), as did the District Court (R., 11), rested its decision upon the supposed use of the words for interpretation in apposition to "a prior proceeding in bankruptcy." The word "prior", however, modifies "proceeding in bankruptcy" alone. Its use obviously is to distinguish between an earlier bankruptcy proceeding and the reorganization proceeding itself, which, being brought under the bankruptcy act, is also a "proceeding in bankruptcy."

There is, moreover, no such thing as "a *proceeding* in equity receivership." A suit that looks merely to the appointment of an equity receiver must be dismissed. *Gordon* v. *Washington* (April 1, 1935) 295 U. S. 30, 70 L. Ed. 626; *U. S.* v. *Sloan Shipyards* (D. C. W. D. Wash. N. D. 1920) 270 Fed. 613; *Central West Public Service Co.* v. *Craig* (8th C. C. A. 1934) 70 Fed. [2d] 427, 432; *Zuber* v. *Micmac Gold Mining Co.* (C. C. Me. 1910) 180 Fed. 625, 627.

In the case first cited this Court said, per Stone, J. (p. 37):

> "A receivership is only a means to reach some legitimate end sought through the exercise of the power of a court of equity. It is not an end in it-

> self. Where a final decree involving the disposition of property is appropriately asked, the court in its discretion may appoint a receiver to preserve and protect the property pending its final disposition."

In the *Central West* case, *supra*, the Eighth Circuit Court of Appeals said (p. 432):

> "The appointment of a receiver is an ancillary, an incidental remedy only, and is not final relief nor is it properly the end or object of the litigation, but is a remedy allowable only in connection with a suit pending for some other purpose in which there is a prayer for ultimate relief which the court has jurisdiction to grant, and to which the appointment of the receiver is an aid."

Equity receiverships do not differ as between themselves. They can only be classified with reference to the primary objects of the bills to which they are auxiliary, and to the ultimate relief sought. While the order appointing one receiver may give powers denied to another for the purpose of accomplishing some object of the suit, or some necessity of the situation, there is no "quality" (to use the language of the District Court, R., 10) possessed by one receiver that is not possessed by all. They all hold the *res pendente lite* for the ultimate determination of its disposition by the court.

Hence the word "proceeding" cannot be attached to the words "equity receivership", and it cannot be said that the statute is limited to "a prior proceeding in equity receivership" which is to be assimilated to "a prior proceeding in bankruptcy". The only words to be interpreted are "equity receivership • • • pending".

(2) The court below said (R., 20): "The appointment of a receiver in foreclosure proceedings is not an act of bankruptcy." This is quite an irrelevant observation. If an act of bankruptcy has been committed, there is no necessity for alleging the pendency of an equity receivership. The legislature can hardly be presumed to have intended

the phrase "equity receivership * * * pending" to be merely co-extensive with the receivership defined as an act of bankruptcy.

The statement of the court below quoted above, however, finds support only in a dictum in *Standard Accident Insurance Co.* v. *Sheftall & Co.* (5th C. C. A. 1931) 53 Fed. [2d] 40, 41, which indeed the court below cites. The receivership in that case, however, was not in the course of a suit for the ratable distribution of the corporation's assets nor for the winding up of its affairs, but was a suit by a judgment creditor to enforce the lien of his judgment upon the corporation's assets for his own exclusive benefit, and it was held that the appointment of a receiver in such case, the defendant being insolvent, was an act of bankruptcy. The "quality" of that receivership was not different from the one at bar, where a mortgagee seeks to subject the corporation's property to the lien of her mortgage. Indeed, a receivership in a suit of the "conservation" type originally could not have constituted an act of bankruptcy. The bills in such suits always allege solvency, but inability to meet debts as they mature. On the other hand, from 1903, when it was first established as an act of bankruptcy, until the act of May 27, 1926, § 3 of the Bankruptcy Act required the appointment of the receiver, in order to constitute an act of bankruptcy, to have been made "because of insolvency". This involved a judicial determination of insolvency. *Walker* v. *Morgan & Bird Gravel Co.* (5th C. C. A. 1927) 20 Fed. [2d] 547.

By the amendment of 1926, the words "because of insolvency" were eliminated, but the words "while insolvent" remained, and the question then arose whether the corporation was in fact insolvent at the time of the appointment, although the creditor had alleged, and the corporation had admitted that it was not. See *In re Luxor Cab Manufacturing Corporation* (2d C. C. A. 1928) 25 Fed. [2d] 644. It would be quite wrong, however, to assert that at any time

it was essential that the receivership be in a suit of any particular type. Such receiverships were in suits of various kinds. For example, the appointment of a receiver in a suit to remove cloud on title was held to be an act of bankruptcy in *Petition of France Foundry & Machine Co.* (D. C. E. D. Mich. S. D. 1921) 276 Fed. 757, 758.

Recently, a state court receivership in a suit by the state to foreclose a tax lien upon the property of the corporation, which "on its face covered all the property of the company", was held, in view of the insolvency of the corporation, to be an act of bankruptcy in *In re White Star Refining Co.* (5th C. C. A. 1935) 74 Fed. [2d] 269, 272.

The case of *Schmidtman* v. *Atlantic Phosphate & Oil Corp.* (2d C. C. A. 1916) 230 Fed. 769, cited by the District Court below, merely held that it would not construe § 9 of the New York Labor Law, providing for priority of wage claims "upon the appointment of a receiver", to mean a priority that would displace the lien of a prior mortgage, and the court said that express language would be required to show such a legislative intent. It is a far cry to assert that that case is authority for limiting "equity receivership" as used in § 77B.

(3) The Court below said (R., 20):

> "The canon of *ejusdem generis* is applicable. Bankruptcy looks to a liquidation of assets and an equitable distribution among creditors. So also does an equity receivership in a 'conservation suit'."

Of course, the principle of *ejusdem generis* is only an aid to construction and is not to be used unless a genuine ambiguity exists. *Mason* v. *United States* (1922) 260 U. S. 545, 554; *Goldsmith* v. *United States* (2d C. C. A. 1930) 42 Fed. [2d] 133, 137.

The court, however, was entirely mistaken in supposing that this was a case where the principle *ejusdem generis* was capable of application.

The canon is thus stated by Manton, C. J., writing for the Second Circuit Court of Appeals in *Goldsmith* v. *United States, supra,* (p. 137):

> "The rule of ejusdem generis means that, where a general term in the statute follows specific words of a like nature, it takes its meaning from the latter, and is presumed to embrace the persons or things of the kind designated by the specific words."

The statute, § 77B(a) Bankruptcy Act (11 U. S. C. § 207 (a)), provides "if a prior proceeding in bankruptcy or equity receivership is not pending" the petitioning creditors must allege an act of bankruptcy within four months.

"Bankruptcy" has a comprehensive and definite connotation. It is a proceeding provided for in the constitution of the United States. Its administration is directed by the statutory enactments of Congress.

"Equity receivership" is the creation of the court of equity, conceived and administered through the exercise of its inherent powers to supply a remedy for any applicant who cannot be properly protected before a court of law. Its origin and development were prior to, and entirely separate from that of bankruptcy.

Equity receivership and bankruptcy each "exhaust the genus". *Mason* v. *United States, supra* (p. 554).

The use of the canon *ejusdem generis,* moreover, is limited to the interpretation of the general expression which follows the particular. Examples are found in *Mason* v. *United States, supra* (pp. 553-554) ("other form of appropriation"); *Mid-Northern Co.* v. *Montana* (1924) 268 U. S. 45, 49 ("other rights"); *United States* v. *Standard Brewery* (1919) 251 U. S. 210 ("other intoxicating * * * liquor") and *Goldsmith* v. *United States, supra,* ("other writing").

Here there are two mutually exclusive specific expressions followed by *no general expression whatsoever.* With due respect, the canon is simply not applicable.

C. The receiver in the "conservation suit" does not differ in kind from the receiver in a mortgage foreclosure suit.

The interpretation of the Circuit Court of Appeals strictly limits the "equity receivership" of the statute to a receivership in a suit of the "conservation" type (R., 19). This is somewhat narrower than the construction of the District Court which thought that "the 'equity receivership' contemplated by Section 77B is of much wider scope than that which frequently accompanies foreclosure proceedings; for example, a general receivership, *or* one such as characterized the so-called 'conservation suits'" (R., 10, italics ours).

The respondents here contend that the receivership may be in a federal, state or territorial court, provided it came into existence because the corporation was unable to meet its debts as they matured (Brief in opposition to certiorari, p. 14).

The corporation does not come to an end when a "general receiver" is appointed. *Chemical Bank* v. *Hartford Deposit Co.* (1896) 161 U. S. 1, 4. The "general" receiver does not receive the corporate franchise. For some purposes the corporation may still function through its board of directors. *No. Pac. Ry. Co.* v. *Frank Waterhouse & Co.* (D. C. W. D. Wash. 1922) 279 Fed. 750, 751; *Johnson* v. *Southern Building & Loan Association* (C. C. W. D. Va. 1899) 99 Fed. 646, 649.

The "general receiver", then, like the foreclosure receiver, is merely a receiver of corporate property. Where is the line to be drawn? The foreclosure receiver may, it is true, receive only a portion of the corporation's property or, as in the present instance, he may receive it all (R., 4). The "general receiver" may receive all of the corporation's property, or he may receive only a small part of it, as in the case of a chain store corporation where its principal office is in the district of the receivership and most of its stores are scattered throughout other states.

The essential sameness of the receivership function is well illustrated by the fact that where a "general receiver" has been appointed and a mortgagee has been permitted to proceed to foreclosure, the receiver first appointed has been authorized to collect the rents for the benefit of the mortgagee, as would be done by a foreclosure receiver. *Bankers Trust Co.* v. *Missouri, K. & T. Ry. Co.* (8th C. C. A. 1918) 251 Fed. 789, 792; *Continental Trust Co.* v. *Toledo St. L. & K. C. R. Co.* (C. C. N. D. Ohio W. D. 1897) 82 Fed. 642; *Clark, Receivers* (2d Ed.) § 1133. The powers of a mortgage foreclosure receiver were extended to that of a general receiver in *Equitable Trust Co.* v. *A. C. White Lumber Co.* (D. C. D. Idaho, N. D. 1930) 41 Fed. [2d] 60, 63.

The case of *Bryan* v. *Welch* (10th C. C. A. 1935) 74 Fed. [2d] 964, certiorari denied 295 U. S. 748, is definitely in conflict with the opinion below in so far as the latter seeks to confine "equity receivership" to suits of the "conservation" type. In that case a creditor's petition for reorganization under § 77B was entertained against Imperial Royalties Company, a common-law trust. The court said, per Phillips, C. J. (p. 970):

> "The amended petitions of intervention filed by Agee and others, Brinstad and others, and Manley and others, and the amended petition filed by Welch and others do not allege an act of bankruptcy within four months, but each of them alleges the pendency of the prior state court receivership. Was it an equity receivership? The grounds alleged for the appointment of a receiver were mismanagement, waste and dissipation of assets, and fraud on the part of the trustees. The receiver was authorized to take possession of all the assets, and the books and records of the Royalties Company, and to enforce and prosecute claims in its favor, to collect moneys due it, and to defend claims and suits against it, and generally to manage, preserve and protect its assets and business. Dissolution or termination of the trust was not contemplated.

"A court of equity by virtue of its general equitable jurisdiction at a suit of a stockholder on the ground of fraud, mismanagement, waste and dissipation of assets by the corporate officers, may appoint a receiver for the corporation to collect, protect, and preserve its assets and to continue its business, and thereafter, when there has been a change of corporate officers or it appears prudent so to do, may restore its property and affairs to its duly constituted corporate authorities.

* * * * * * *

"We conclude that the state court receivership was an equity receivership within the meaning of section 77B."

It may be observed with respect to the receivership held an equity receivership in the foregoing decision that, (1) it was a state court receivership; (2) it was not of the "conservation type"; (3) the receiver was not appointed because of alleged inability of the debtor to meet its debts as they matured, but to prevent waste; (4) the statute did not contemplate the winding up of the debtor and the distribution of its assets, but the restoration of its property to the debtor when there had been a change of corporate officers; and (5) the suit bore no resemblance whatever to a proceeding in bankruptcy.

The receivership to prevent waste of corporate assets is, of course, closely akin to a receivership of land for the protection of the remaindermen against the life tenant or other holder of the particular estate, or for the protection of the mortgagee against the mortgagor. 4 Pomeroy, Eq. Jur. (4th Ed. 1919) § 1334 pp. 3196-3199.

Bryan v. *Welch*, therefore, is directly opposed not only to the decision of the court below but to the theories of the District Court and of the respondents here as well. Certainly, it aligns the Tenth Circuit with the Seventh Circuit in opposition to the decision of the Second Circuit under review.

D. Adherence to the legal and literal meaning of the statute does not lead to absurd and impractical consequences.

This is the only exigency in which departure from the accepted meaning of the statute's terms is permissible. *United States* v. *Mo. Pac. R. Co.* (1929) 278 U. S. 269; *Chicago Home for Girls* v. *Carr* (1921) 300 Ill. 478, 483, 133 N. E. 344, 346-347.

"The absurdity must be so gross as to shock the general moral or common sense." *Crooks* v. *Harrelson* (1930) 282 U. S. 55, 60.

There is, however, only one suggestion in the opinion below that the acceptance of the literal and legal meaning of the words used by the legislature produces an impractical result.

The opinion below argues (R., 20):

> "We cannot think that Congress intended to give three creditors having claims totaling as little as $1,000, the right to force a corporation into a reorganization, if a receiver were appointed in the foreclosure of a mortgage covering any of its property. Situations may well be imagined in which a corporation might allow a mortgage on part of its land or on a chattel to be foreclosed, with the appointment of a receiver pending foreclosure, without being in any need of a reorganization. We do not believe that it was the purpose of Congress to permit every foreclosure proceeding in which a receiver might be appointed to be superseded by an involuntary reorganization."

This argument, however, completely ignores other provisions of the statute. If "equity receivership" is given its literal and legal meaning, that does not permit "every foreclosure proceeding in which a receiver might be appointed to be superseded by an involuntary reorganization." Such a result can follow only if the corporation is (1) insolvent, or unable to meet its debts as they mature, and (2) if the petition is filed in good faith (Section 77B, subd. (a)). With these safeguards against the haphazard

or unscrupulous use of the involuntary petition for reorganization, there is no reason why the right to file such a petition should not follow the existence of a mortgage foreclosure receivership. The foreclosure of any portion of a corporation's property is usually a symptom of financial distress. When accompanied by the corporation's insolvency or inability to meet its debts as they mature, the creditors of the corporation should be permitted to avert the disaster and set in motion the machinery of reorganization. They should not be left to the mercy of the debtor's own board of directors which through deadlock, lack of direct interest, ulterior motives or mere indolence, may be unable or unwilling to help them. At least the existence of such a remedy is not so absurd "as to shock the general moral or common sense".

The necessary effect of the decision below is to exclude from relief and reorganization under § 77B of the Bankruptcy Act at the instance of creditors practically all corporations the activities of which are limited to holding or operating real estate (unless the corporation is actually bankrupt), since in the case of such corporations the receivership which accompanies financial distress is almost invariably a foreclosure receivership. This is an actuality, and is a result far more unjust and absurd than the supposed case put by the court below.

POINT III.

The statute furnishes its own definition of "equity receivership * * * pending," which is in accord with the literal meaning and full operation of those words.

Subdivision (i), quoted in the Appendix, provides expressly that a petition may be filed under this section by the corporation's creditors "as provided in subdivision (a) of this section," "if a receiver or trustee of all *or any part* of the property of a corporation has been appointed by a

federal, state or territorial court." This language is also plain and unambiguous, and affords to the creditors a right to petition under the section: (1) whether the appointment is over all, or only a part of the property, and (2) whether the appointment is by a federal, state or territorial court. This plain language precludes the interpretation that the appointment of a receiver of the property in foreclosure is not within the statute, or that the statute must be limited to a receivership pending in the federal court.

True, the petition may be filed "as provided in subdivision (a)." The fair interpretation of this phrase is that to the requirement of the "pending" receivership, defined by this subdivision, must be added the other requirements of subdivision (a), to wit: that the creditors shall be three in number, that their claims aggregate $1,000, and that the corporation shall be either insolvent or unable to meet its debts as they mature. It cannot be said that the provision that a petition may be filed "as provided in subdivision (a)" also requires the allegation of an act of bankruptcy, or the existence of a prior proceeding in bankruptcy, or of the pendency of an equity receivership other than as defined in subdivision (i). The words quoted above from subdivision (i) would, under such construction, be bereft of all significance and might as well be stricken from the statute as redundant.

The learned court below considered that this provision of subdivision (i) "contemplates a situation where the corporation may have property outside the jurisdiction of the appointing court, in which case only part of its property could be in equity receivership without ancillary proceedings" (R., 21).

But if all that Congress meant was that the creditors might petition if an equity receivership existed in another jurisdiction, it would have been easy enough to say "if a receiver or trustee of the property of a corporation has been appointed in any jurisdiction by a federal, state or territorial court". Congress, however, did not say that.

It said "if a receiver or trustee of all or any part of the property of a corporation has been appointed by a federal; state or territorial court". The universality of the latter proposition, under the authorities already cited, cannot be limited to the narrow confines of the former. Certainly it cannot be so done without good reason. Besides, conservation suits are ordinarily commenced where the principal office of the corporation is situated, and so ordinarily are reorganization proceedings. The language in question can hardly be construed as having been adopted merely for the purpose of enabling creditors to institute the reorganization proceedings in a jurisdiction other than that in which the equity receivership or the conservation suit is pending.

POINT IV.

Judicial restriction of the meaning of the words "equity receivership" is contrary to the purposes of the act.

A. **This is a remedial statute requiring a liberal construction to accomplish the relief intended by Congress.**

The National Bankruptcy Act as a whole must be construed liberally. In *Continental Ill. Nat. B. & T. Co.* v. *C. R. I. & P. R. Co.* (1935) 294 U. S. 648, 668, 79 L. Ed. 642, 651, this Court in dealing with the companion § 77 said, per Sutherland, J.:

> "From the beginning, the tendency of legislation and of judicial interpretation has been uniformly in the direction of progressive liberalization in respect of the operation of the bankruptcy power."

The amendment which added § 77B was, of course, one of that group of statutes which were enacted to relieve business from the effects of the depression and to hasten economic recovery. It was thus peculiarly a remedial statute.

In dealing with § 77B, the Fourth Circuit Court of Appeals in *Campbell* v. *Allegheny Corporation* (1935) 75 Fed. [2d] 947, 950, said, per Parker, C. J.:

> "The statute is of a remedial character, designed to facilitate the reorganization of corporate business made necessary by the economic depression through which the country has been passing. Its purpose should be forwarded by a fair and liberal construction of its provisions, not thwarted by any narrow or technical interpretation, and certainly not by reading into its language conditions and limitations which the lawmakers themselves did not see fit to express."

B. **A purpose of the statute was to enable the debtor and its creditors to avoid, if possible, the sacrifice and expense involved in foreclosure sales.**

In upholding the constitutionality of the companion section, § 77, the Supreme Court in *Continental Ill. Nat. B. & T. Co.* v. *C. R. I. & P. R. Co.* (1935) 294 U. S. 648, 685, 79 L. Ed. 642, 660, said:

> "The delay and expense incident to railroad receiverships and foreclosure sales constituted, probably, the chief reasons which induced the passage of § 77; and to permit the perpetration of either of these evils under this new legislation would be subversive of the spirit in which it was conceived and adopted."

Something of the same thought with relation to § 77B was expressed by Judge Lindley in his decision in *In re Granada Hotel Corporation* (1935) 9 Fed. Supp. 909, which was affirmed by the Seventh Circuit Court of Appeals:

> "As the court has previously pointed out, the intent of Congress apparently was to give the holders of bonds in default an opportunity to have property securing their bonds reorganized in the federal court in lieu of liquidation under foreclosure in either the state or federal court."

If it was the intention of Congress to permit the holders of bonds in default to avoid the expense of foreclosure by

having their property reorganized under § 77B, *a fortiori* it was the right of general creditors, whose equities in a valuable property would be wiped out by the sale of the property under a small mortgage, to have the court assume jurisdiction, and thus to have an opportunity to seek to finance the mortgage and to prevent its foreclosure. This does not lead to any unjust, oppressive or absurd result. On the contrary, it affords an opportunity which is just, fair and reasonable.

The argument of the court below comes down to this, that an equity receivership of the entire property of the debtor is an "equity receivership" if the ultimate purpose of the suit is a ratable distribution of the assets among the creditors secured and unsecured, but is not an "equity receivership" if the ultimate object is the application of the property to the satisfaction of a secured creditor or, as often happens in the case of mortgage bonds, a class of secured creditors. Surely the legislature could not have intended that creditors could interrupt the course of a proceeding seeking a ratable distribution of the assets among all creditors, and could not interrupt the sacrifice of the property in the interest of one secured creditor or class of creditors.

POINT V.

The decision of the Seventh Circuit Court of Appeals rests upon a more logical basis.

The decision of the Second Circuit Court of Appeals below is exactly the opposite of the decision of the Seventh Circuit Court of Appeals in *In re Granada Hotel Corporation* (June 5, 1935), 78 Fed. [2d] 409, which affirmed the decision of the District Court for the Eastern District of Illinois (February 26, 1935) 9 Fed. Supp. 909. That case, which *sub nom. Tuttle v. Harris,* is also before this Court,

includes an additional question not involved here, i. e.; whether custody of the property under order of the court by a mortgage trustee, and not by a receiver selected by the court, constitutes a receivership.

The opinions both of the Circuit Court of Appeals and of the district court in that case give more emphasis to that feature of the controversy. They plainly show, however, that the instant question not only was necessarily decided but was considered by both courts. Indeed, in an application for rehearing to the Circuit Court of Appeals the decision below was urged as a reason for change in its decision. Rehearing, however, was denied on July 16, 1935.

The views of Judge Lindley, whose decision was affirmed, are clearly set forth in another case, *Matter of Surf Building Corporation* (D. C., E. D. Ill. 1934), 11 Fed. Supp. 295, where he said in part (p. 297):

> "It may be well to comment upon one or two contentions submitted by the respondents. It is insisted that an equity receivership, growing out of a foreclosure proceeding which vests in the receiver of a court of equity the custody and possession of all the assets of the corporation, is not an equity receivership within the meaning of the statute. I have already said in other cases, probably so often as justly to be accused of tiresome reiteration, that a receivership in equity is always incidental to some other ultimate purpose; that equity jurisprudence recognizes no such proceedings as one which has for its only prayer for relief, receivership, but that all receivers in equity are appointed, whether in dissolution of partnerships, in mortgage foreclosure or upon creditors' petition, in subordination of and incidental to the main purpose of the litigation. This court is of the opinion that Congress did not intend, by the provisions of 77-B, to limit jurisdiction under that section to equity receiverships other than those in foreclosure cases. To do so would be to defeat the purpose of the Act in a very important branch of equity jurisdiction."

Respondents below relied upon *In re Laclede Gas Light Co.* (D. C., E. D. Mo. June 26, 1934, not officially reported) C. C. H. Bankruptcy Law Service, Paragraph 3001. Certain remarks there are in accordance with the decision reached below. They were not at all necessary, however, to the decision, since in that case it appeared that no receiver whatever had been appointed at the time the petition for reorganization was filed. This also was the situation in *In re Broadway-Barclay Corporation* (2d C. C. A. July 15, 1935) 78 Fed. [2d] 680, decided by the court below simultaneously with its decision herein, and which reversed the decision of Judge Goddard. For the reason stated, these cases are plainly distinguishable.

The other decision in the District Court for the Southern District of New York, *In re Draco Realty Corporation* (June 3, 1935) 11 Fed. Supp. 405, was rendered after the decision in the District Court below and was, therefore, compelled by the rule *stare decisis*.

The decisions of Judge Lindley in *In re Flamingo Hotel Co.* (1934, not officially reported) C. C. H. Bankruptcy Law Service, Paragraph 3007, *In re Surf Building Corporation, supra,* and *In re Prairie Avenue Building Corporation* (1935) 11 Fed. Supp. 125, 128, support this brief.

CONCLUSION.

The literal and legal meaning of "equity receivership * * * pending" does not involve any particular ultimate relief. It is merely the description of a condition which may exist in many types of equity suits in which, pending ultimate disposition, the court has temporarily placed the property of the debtor in the hands of its custodian. Departure from the literal and legal meaning of "equity receivership * * * pending," in favor of a local, colloquial or otherwise restricted meaning can only be justified if adherence to the literal and legal meaning involves oppression, injustice or

absurdity. In the present case it is the restricted and colloquial meaning which involves injustice and absurdity, and the literal and legal meaning which is in accord with the purposes of the act, and with the liberal construction to which it is entitled as a remedial statute. The view of the Circuit Court of Appeals for the Seventh Circuit should be accepted.

The decisions of the Second Circuit Court of Appeals and of the District Court for the Southern District of New York should be reversed and the motions to dismiss the petition for reorganization denied.

Dated, New York, January 7, 1936.

Respectfully submitted,

HAROLD HARPER,
MARK M. HORBLIT,
Counsel for Petitioners.

APPENDIX.

STATUTE.

The portions of § 77B of the National Bankruptcy Act as amended that are material are as follows:

> "(a) * * * Three or more creditors who have provable claims against any corporation which amount in the aggregate, in excess of the value of securities held by them, if any, to $1,000 or over may, if such corporation has not filed a petition or answer under this section, file with the court in which such corporation might file a petition under this section, a petition stating that such corporation is insolvent or unable to meet its debts as they mature and, if a prior proceeding in bankruptcy or equity receivership is not pending, that it has committed an act of bankruptcy within four months, that such creditors propose that it shall effect a reorganization; and such corporation shall, within ten days after the service of a copy of such petition upon it, answer such petition. * * *"

> "(i) If a receiver or trustee of all or any part of the property of a corporation has been appointed by a Federal, State, or Territorial court, whether before or after June 7, 1934, at 12 o'clock noon a petition or answer may be filed under this section at any time thereafter by the corporation, or its creditors as provided in subdivision (a) of this section and if such petition or answer is approved, the trustee or trustees appointed under this section, or the debtor if no trustee is appointed, shall be entitled forthwith to possession of and vested with title to such property, and the judge shall make such orders as he may deem equitable for the protection of obligations incurred by the receiver or prior trustee and for the payment of such reasonable administrative expenses and allowances in the prior proceeding as may be fixed by the court appointing said receiver or prior trustee. * * *"

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Supreme Court of the United States

OCTOBER TERM, 1935.

No. 533.

DUPARQUET HUOT & MONEUSE CO., E. E. ALLEY CO., INC., and H. B. DAY CO., INC.,
Petitioners,

vs.

FRYSINGER EVANS, DU-WEL CLEANING CONTRACTING CO., GREENLEIGH PRINTING CO., INC., and GRAMERCY QUALITY LAUNDRY CO., INC.

REPLY BRIEF FOR PETITIONERS.

HAROLD HARPER,
MARK M. HORBLIT,
Counsel for Petitioners.

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REPLY BRIEF FOR PETITIONERS.

I.

Respondents contend (Brief, pp. 3, 14) "Since it is conceded that there is no such thing as a proceeding in equity receivership, the phrase is ambiguous and subject to construction." But why attribute to Congress an incongruity which the grammatical structure does not require, and without which there would be no ambiguity and no need for construction? The words are "if a prior proceeding in bankruptcy or equity receivership is not pending." The phrase has elsewhere been analyzed (Main Brief, p. 14), and there is no necessity of relating the word "proceeding" to "equity receivership". Certainly that could not have been done if the article "an" had preceded "equity receivership". Yet such language would have been equally acceptable to Congress. The House record of the Conference Report reads:

"On amendment No. 5: The Senate amendment, to which the House agreed, makes it unnecessary to show that

the corporation has committed an act of bankruptcy within four months in case a prior proceeding in bankruptcy or an equity receivership is pending at the time proceedings under the reorganization section are initiated." 78 Cong. Rec. 9898 [1934].

II.

Nothing in the legislative record suggests that Congress intended to limit "equity receivership" to a suit of the conservation type. Even the mild statement of the court below (R., 20) that this *record* indicates "that the legislators were thoroughly familiar with this (conservation) type of receivership" appears mistaken. One reference (78 Cong. Rec. 7890) is to the debate over the provision permitting the filing of the petition in the jurisdiction of origin as well as in the jurisdiction of the principal place of business, which resulted in an amendment authorizing a transfer where the interests of the parties make it desirable. The other (78 Cong. Rec. 7905-7) is to the debate over the propriety of permitting Irving Trust Company to be sole receiver in bankruptcy in the Southern District of New York. Neither has anything to do with equity receiverships.

Respondents point out (Brief, pp. 8-9, footnote) that Representative McKeown in the course of hearings before the House Judiciary Committee explained that the bill *in its original form* had not conferred any remedy upon creditors, because creditors had the remedy of a federal receivership. From this respondents argue, though it seems a *non sequitur*, that when the remedy was subsequently given by amendment it was intended to be limited to cases in which there was bankruptcy or a receivership of the conservation type. This well illustrates the fallacy, pointed out in *United States* v. *Freight Association* (1897) 166 U. S. 290, 308, of arguing from the supposed views of individual legislators. If Representative McKeown entertained

any such view he certainly has changed it. In his book, McKeown & Langeluttig (1935) "Federal Debtor Relief Laws", he states that a foreclosure proceeding, "which involves the financial inability of a corporation to meet its debts", is such a proceeding as is contemplated by the act (pp. 112-115).*

III.

It may be conceded that broader powers are usually conferred upon the receiver in a conservation suit than are usually conferred upon a receiver in a foreclosure suit (Brief, pp. 9-12). Such a distinction, however, is of no importance unless the words "equity receivership" are so uncertain as to be open to construction, and then only if a legislative purpose can be descried which would include the former and exclude the latter from the designation.

The Court will notice the large number of defaulted real estate bond issues.** The effect of excluding the foreclosure receivership as a basis of jurisdiction will be to limit the readjustment of these bond issues under 77B to cases where there is a board of directors ready, able and willing to help by filing a voluntary petition. The alternative is reorganization in the state courts or federal conservation suits. The former courts, lacking the bankruptcy power, operate under statutes of doubtful constitutionality or with the waste and expense attending foreclosure proceedings. The conservation type of suit has been denounced

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* The view of Representative McKeown in his book is somewhat different from that here advanced. He treats subdivision (i) as furnishing an *additional* ground of jurisdiction for an involuntary proceeding by creditors, and not as defining "equity receivership". He would permit a creditors' petition in the case of a foreclosure proceeding, "which involves the financial inability of a corporation to meet its debts", if a trustee or receiver is appointed for *all or any part* of the property of the corporation, and remarks that the provision of § 77B is in this respect broader than the provisions of the General Bankruptcy Act, 3(a)(5), 11 U. S. C. A. 21(a)(5).

** "The default in more than a majority of real estate bonds threatens investments estimated at eight billion dollars." 30 Columbia Law Review, 905 (June 1935).

in this court (Main Brief, p. 11), and is concededly unsatisfactory. As a commentator points out the problem is "whether the federal forum shall be denied to some groups and extended to others, solely because of the operation of fortuitous factors." 36 Columbia Law Review 153 (January 1936). True the affairs of a real estate corporation are local, but equally so are the affairs of an industrial corporation which happens to have a convenient creditor residing in another state. If there had been any legislative purpose to exclude corporations of a local character from the beneficent effects of 77B, voluntary petitions would have been excluded as well. If the decision of the court below is sustained, as pointed out in 30 Illinois Law Review 627 (January 1936), the many involuntary real estate reorganizations that are already pending under 77B will be thrown back into the state court or into conservation suits. This is too great a price to pay merely to preserve a supposed parallel between "equity receivership" and the receivership constituting an act of bankruptcy. Especially, when the supposed insufficiency of a foreclosure receivership to constitute an act of bankruptcy, if insolvency concurs, is based entirely upon the dictum in *Standard Accident Insurance Co. v. Sheftall & Co.* (5th C. C. A. 1931) 53 Fed. [2d] 40, 41.

IV.

The idea that a creditors' petition will be looked at askance because the legislation is labeled "for the relief of debtors" (Section 77A, 11 U. S. C. § 206), is not in accordance with the views of the lower federal courts. These construed 77B as designed to relieve the debtor's creditors as well. As pointed out by Judge Mack in *In re Associated Gas & Electric Co.* (D. C., N. D. N. Y, 1935) 11 Fed. Supp. 359, 365 "this tag was attached to what was apparently the earliest draft bill" before any provision was made for creditors' petitions. He observes that, as the section was finally enacted, its scope was broadened by

the provision for involuntary petitions, and concludes "the interests of creditors as well as of the debtor are therefore to be considered in construing the language of the act." So Manton, C. J., in *In re 235 West 46th Street Co.* (2d C. C. A. 1935) 74 Fed. [2d] 700, 701, says:

> "It was the purpose of section 77B of the Bankruptcy Act to protect creditors and the debtor's equity in its property against possible injury traceable to frozen asset problems."

It has already been pointed out (Main Brief, pp. 22-23) that the corporation which allows a small portion of its property, the result of an unprofitable venture, to go the way of foreclosure, could not be subject to a creditors' petition unless the concomitant conditions were met of (1) insolvency, or inability to pay debts as they matured, and (2) a petition filed in good faith. It may be observed in addition that where, as in the case put (Respondents' Brief, pp. 15-16), the corporation has not assumed the mortgage indebtedness, failure of the corporation to perform the obligation secured by the mortgage will not even furnish evidence of its inability to meet debts as they mature.

Furthermore, the requirement that the petition must be filed in good faith as construed by the lower federal courts is no mere expression of a pious hope. There must be need for reorganization. *Manati Sugar Co.* v. *Mock,* (2d C. C. A. 1935) 75 Fed. [2d] 284, 285. There must be an actual intent to accomplish a reorganization. *In re South Coast Co.* (D. C. D. Del. 1934) 8 Fed. Supp. 43, 44. And there must be a probability that a reorganization can be effected. *Manati Sugar Co.* v. *Mock, supra; In re Grigsby-Grunow Co.* (7th C. C. A. 1935) 77 Fed. [2d] 200, 202; *In re Electric Public Service Co.* (D. C. D. Del. 1934) 9 Fed. Supp. 128.

If the courts follow these precedents, and if they observe the plain requirement of the statute that the debtor must

either be insolvent or unable to meet its debts as they mature, there is no fear that a comfortable corporation can be compelled to embark upon an unnecessary reorganization merely because it has suffered a portion of its property covered by an unassumed mortgage to be the subject of foreclosure receivership. See Gerdes "'Good Faith' in the Initiation of Proceedings Under Section 77B of the Bankruptcy Act" (1935) 23 Georgetown Law Journal 417-431.

The matter *dehors* the record (Brief, p. 17), which is inserted by way of "illustration" is quite immaterial in view of the fact that the rights of the parties must be determined as of the time when the petition was filed. *Bailey, Trustee* v. *Baker Ice Machine Co.* (1915) 239 U. S. 268, 275. It would be quite wrong, however, for the Court to draw the inference from the quite inadequate statement of the careening course of this corporation since the petition was dismissed below, that the debtor does not stand in need of reorganization, both in the interest of the petitioning and other creditors, who have not been paid, and in the interest of the bondholders of an earlier corporation on whose behalf the debtor was organized. Without accepting the invitation to wander from the record, suffice it to say that when this case comes to a hearing upon the facts it will not furnish a horrible example of the result of according to the language of a statute its literal and precise meaning, or of so construing a remedial statute as to promote the beneficial results at which it is aimed.

V.

The President's Message, read January 11, 1933 (76 Cong. Rec. 1569) was in part as follows:

> "The process of forced liquidation *through foreclosure* and bankruptcy sales of the assets of individual

and corporate debtors who through no fault of their own are unable in the present emergency to provide for the payment of their debts in ordinary course as they mature, is utterly destructive of the interests of debtor and creditor alike, and if this process is allowed to take its usual course misery will be suffered by thousands without substantial gain to their creditors, who insist upon liquidation and *foreclosure* in the vain hope of collecting their claims. In the great majority of cases such liquidation under present conditions is so futile and destructive that voluntary readjustments through the extension or composition of individual debts and the reorganization of corporations must be desirable to a large majority of the creditors." (Italics ours.)

All four of the sections added by Chapter 28 to the Bankruptcy Act, 74 (compositions and extensions for individual debtors), 75 (agricultural compositions), 77 (railroad re-organizations), and 77B (corporate re-organizations) were responsive to that Message, although the last, originally incorporated in the bill, was for lack of time left over for the next Congress. If resort is necessary to the legislative record, it abundantly shows the intent of both houses to afford relief by these amendments against foreclosures. 76 Cong. Rec. 2931, 2941, 2913-14, 2915, 5107, 5127, 5358.

So do the sections themselves. Section 74 operated upon mortgagees and other secured creditors. They were made parties to the composition, the right of foreclosure was postponed and the bankruptcy court took jurisdiction of the mortgaged premises. Section 75 so far cut down the rights of mortgagees as to be held by this Court in violation of the Federal Constitution. *Louisville Bank* v. *Radford* (1935) 295 U. S. 555. The delay and expense incident to railroad foreclosures was one of the chief reasons for Section 77. *Continental Ill. Nat. B. & T. Co.* v. *C. R. I. & P. R. Co.* (1935), 294 U. S. 648, 685.

To interpret "equity receivership" as not including a case where the proceeding may end foreclosure and sale is to deny the very spirit and intent which animated Congress in passing all four sections amending the Bankruptcy Act.

It will be noted that the two sections relating to individuals do not provide for a petition by creditors. The threat of actual bankruptcy was no doubt thought a sufficient spur to induce the debtor to protect the rights of general creditors. The two corporate sections do provide for a petition by creditors, and this is obviously because the corporation may be unable or unwilling to help. But if the corporation is in receivership in a suit of the conservation type, it has already manifested its ability and willingness to help by admitting the allegations of the bill and joining in the prayer. *Re Metropolitan Railway Receivership* (1908), 208 U. S. 90. Of course it will file a petition under Section 77B, since there is no advantage to it in not doing so. Hence to limit the right of petitioning creditors of a solvent corporation to cases where the conservation type of proceeding is pending is to limit it to the type of case in which such right is least necessary.

Dated, New York, January 14, 1936.

Respectfully submitted,

HAROLD HARPER
MARK M. HORBLIT,
Counsel for Petitioners.

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CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1935.

No. 533.

IN THE MATTER OF 2168 BROADWAY CORPORATION,

Debtor,

DUPARQUET HUOT & MONEFSE CO., E. E. ALLEY CO. INC., and H. B. DAY CO., INC.,

Petitioners,

—against—

FRYSINGER EVANS, DU-WEL-CLEANING CONTRACTING CO., GREENLEIGH PRINTING CO., INC. and GRAMERCY QUALITY LAUNDRY CO. INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF OF RESPONDENTS IN OPPOSITION.

DANIEL A. SHIRK,
EDWIN R. WOLFF,
Counsel for Respondents.

THE COURT PRESS, N. Y. C.

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Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF OF RESPONDENTS IN OPPOSITION.

Opinions Below.

The opinion of the District Court (R. 17-19) is reported in 11 Fed. Supp. 404. The opinion of the Circuit Court of Appeals (R. 30-34) is reported in 78 F. (2d) 678.

Jurisdiction.

The order of the Circuit Court of Appeals was entered July 22nd, 1935 (R. 34-35). The petition for

a writ of certiorari was filed October 22nd, 1935. The jurisdiction of this Court is invoked under Section 740 (a) of the Judicial Code, as amended by the Act of February 13th, 1925.

Question Presented.

Is a foreclosure action involving real property, in which a receiver has been appointed, and who is administering and receiving the income therefrom, an "equity receivership" within the meaning of Section 77-B (a), Bankruptcy Act, 11 U. S. C. A., Section 207 (a), so as to confer upon alleged creditors of the corporation which had legal title to the property at the time the petition was filed, the right to subject the corporation and its alleged property to the jurisdiction of the Bankruptcy Court?

Statutes Involved.

The applicable provisions of the Statutes involved are set forth in the Appendix, *infra,* pages 19, 20.

Statement.

Three persons alleging that they were creditors of the 2168 Broadway Corporation, filed a petition under Section 77-B (a) of the Bankruptcy Act, to effect a reorganization of that corporation (R. 1-9).

They alleged they had provable claims against the corporation, in excess of $1,000 (R. 2); that the corporation was unable to meet its debts as they matured, and that it had committed an act of bankruptcy within four months preceding the filing of the petition (R. 4). It was conceded by petitioners in the Court below, that the petition did not allege an act of bankruptcy,

as there was no allegation of insolvency in the bankruptcy sense (Section 3-a, Bankruptcy Act; 11 U. S. C. A. Section 21 (a)). Petitioners insisted however, that there were sufficient allegations of fact set forth in the petition to show that there was an "equity receivership" pending, within the meaning of Section 77-B (a). These facts consist of the allegations that on or about October 15th, 1934, an action was commenced in the Supreme Court of the State of New York, County of New York, against the corporation, to foreclose a mortgage on the property of the corporation; that the complaint in that action alleged the corporation's default in payment of interest on the mortgage, which had matured on September 19th, 1934; that thereafter the Court appointed receivers of the said property of the corporation, in said action; that the receivers went into possession, and at the time of the filing of the petition, held the property and were receiving and administering the income therefrom for the benefit of the plaintiff in said action (R. 4).

Certain statements in the petition, it has been conceded, are inaccurate. For instance, the allegation that the corporation is a subsidiary of, and all of the stock thereof is held by or for Commonwealth Bond Corporation, has been admitted to be inaccurate (R. 7).

Other creditors of the corporation, respondents herein, moved to dismiss the petition on the ground that the petition does not set forth sufficient facts to give the Court jurisdiction under Section 77-B of the National Bankruptcy Act, as amended. It was specifically set forth in the notice of motion that the petition fails to allege an act of bankruptcy (R. 13-14). It was further contended by respondents, that a mortgage foreclosure action in which receivers have been

appointed to collect rents, is not an "equity receivership" within the meaning of Section 77-B.

The District Court held that a receivership that is merely incidental to the foreclosure of a mortgage on real estate of a corporation that is unable to meet its debts as they mature, is not of the quality of the "equity receivership", which, under the provisions of Section 77-B, and in the absence of an act of bankruptcy, will confer upon creditors of the corporation a right to subject it and its property to the jurisdiction of the bankruptcy court (R. 17-19). The order on the motion of respondents to dismiss the petition was made and entered on May 13th, 1935, by the District Court (R. 20-22). Upon appeal, the Circuit Court of Appeals affirmed the order of the District Court on substantially the same grounds as those stated by the District Court. The Circuit Court of Appeals held that the kind of suit to which the words "equity receivership" are usually applied in common parlance, is one commenced by a simple contract creditor praying for the conservation of the assets of a corporation, insolvent in the common law sense, in which the corporation confesses the allegations of the bill and consents to the appointment of a receiver; that the end sought by such a suit is the liquidation of the assets and equitable distribution among creditors; and that it was a receivership of this general type, which Congress had in mind when it enacted Section 77-B (R. 32).

Argument.

The Question Involved in the Case at Bar Is Academic.

Petitioners filed an involuntary petition against the 2168 Broadway Corporation, under Section 77B

of the Bankruptcy Act as amended, and alleged, as the basis for the Court's jurisdiction that the debtor had committed an act of bankruptcy, which consisted, so they alleged, of the fact that a receiver had been appointed in a mortgage foreclosure action covering real property alleged to be owned by the corporation (R. 4). At the argument in the District Court they conceded that the petition did not allege an act of bankruptcy. They insisted, however, that the petition did show the existence of an "equity receivership" within the meaning of Section 77B (a), and that under that statute where it is shown that an "equity receivership" is pending, no act of bankruptcy need be alleged.

We shall take up subsequently the question of law, whether or not the petition in fact did show the existence of an "equity receivership" within the meaning of Section 77B.

Subsequent to the order of the Circuit Court of Appeals, which was made on July 22nd, 1935, and which affirmed the order of the District Court, dismissing the petition as insufficient in law, the mortgage foreclosure action described in the petition, was discontinued, and the receivership in said action, terminated on October 10th, 1935 by an order duly made and entered.

Moreover in December, 1934, and almost two months *prior* to the filing of the petition for adjudication, one, Frysinger Evans, commenced a representative action in the Supreme Court of the State of New York against 2168 Broadway Corporation (alleged debtor herein) and others, to have it adjudged that the said defendant held the real property known as Hotel Manhattan Towers, as a trustee for the benefit of the plaintiff and others similarly situated; thereafter,

and on May 14th, 1935, a decree was entered in that action, in which it was adjudged in substance, that the said 2168 Broadway Corporation and others, were each a trustee for the benefit of the plaintiff, Evans, and others similarly situated, and that the subject matter of the trust is the real property which the petitioners herein described in their involuntary petition, filed under Section 77B. Under that judgment, therefore, the 2168 Broadway Corporation, alleged debtor herein, was never the beneficial owner of the real property, which was the subject matter of the foreclosure proceeding. It has been held that a Court of bankruptcy has no jurisdiction over a debtor in its trust capacity, or over trust property. *In re Commonwealth Bond Corporation*, 77 F. (2d) 308 (C. C. A. 2).

The question, therefore, of what is meant by an "equity receivership", so far as it involves the case at bar, has become academic, and no real controversy exists.

A foreclosure action involving real estate in which a receiver to collect rents has been appointed, is not an "equity receivership" within the meaning of Section 77-B

The question presented on this application hinges upon the definition to be given to the words "equity receivership", to be found in Section 77-B of the Bankruptcy Act, as amended.

The District Court and the Court of Appeals decided that these words were subject to construction; that they refer to a receivership of the general type known as the "conservation" suit; that during the progress of the bill Congress was familiar with this type of receivership; that the phrase is used in appo-

sition to "a prior proceeding in bankruptcy"; that the rule of *ejusdem generis* is applicable; that this form of receivership, like bankruptcy, looks to a liquidation of assets and an equitable distribution among creditors; that the legislative plan was to aid a distressingly large number of corporations which had been or were in danger of being placed in bankruptcy or equity receivership of the general type described, and that the purpose of the legislation was to supersede proceedings looking to liquidation by proceedings looking to reorganization. Accordingly the two lower courts held that a receiver appointed in a mortgage foreclosure action was not an "equity receivership" (R. 17-19, 32-33).

The same conclusion was reached by another District Court in *In re Draco Realty Corp.* (D. C. S. D. N. Y.), 11 Fed. Supp. 405. See also *In re Laclede Gas Light Co.* (D. C. E. D. Mo. June 26, 1934, not officially reported).[1] Opposed to these decisions are three cases arising in the Eastern District of Illinois, wherein Judge Lindley held that a mortgage foreclosure suit in which receivers were appointed to be an "equity receivership" within the meaning of Section 77-B. *In re Flamingo Hotel Co.*[2] (Aug. 9, 1934, not officially reported); *In re Surf Bldg. Corp.* (Oct. 17, 1934, not officially reported); and *In re Granada Hotel Corp.* (D. C.) 9 Fed. Supp. 909. The case last

1. This opinion appears in the bankruptcy law service of Commerce Clearing House, Inc., pages 1101-1103, paragraph 3001.

2. Friendly, in *Some Comments on the Corporate Reorganizations Act*, 48 Harv. L. Rev. (1934) 39, 54 (Note 57), states his view of the conflict between the *Laclede* and the *Flamingo* cases as follows:

> "• • • The decision in the *Flamingo Hotel* case, E. D. Ill., Aug. 9, 1934 is *contra*. *It is submitted that the Laclede decision is correct, and that the term 'equity receivership' should be restricted to proceedings initiated by the filing of a general creditor's bill* and should not be applied to proceedings purely for the enforcement of liens even though such proceedings involve the appointment of a receiver of the property subject to the lien." (Italics ours.)

cited has been affirmed by the Circuit Court of Appeals for the Seventh Circuit, in a short *per curiam* opinion, 78 F. (2d) 409 (rehearing denied July 26, 1935).

It has been held by this Court that it is its duty to give effect to the intent of Congress; that primarily this intent is to be ascertained by giving the words used their natural and literal significance; but that if this leads to an unreasonable result, plainly at variance with the policy of the legislation as a whole, rules of construction require further investigation into the reason of the enactment and its history; that the Statute will be given the effect Congress intended, sacrificing, if necessary, the literal meaning; that other parts of the statute must be considered and that a construction strictly according to the letter, without regard to the legislative intent, is not to be desired. We believe that these canons of construction have been definitely laid down by this Court.

Ozawa v. *United States,* 260 U. S. 178, 194;
Helvering v. *New York Trust Company,* 292 U. S. 455, 464;
Ebert v. *Poston,* 266 U. S. 548, 554.

In the *Ozawa* case, *supra,* Mr. Justice Sutherland, in the opinion of the Court, stated (p. 194):

> "It is the duty of this Court to give effect to the intent of Congress. Primarily this intent is ascertained by giving the words their natural significance, but if this leads to an unreasonable result, plainly at variance with the policy of the legislation as a whole, we must examine the matter further. We may then look into the reason of the enactment and inquire into its antecedent history, and give it effect in accordance with its design and purpose, sacri-

ficing, if necessary, the literal meaning in order that the purpose may not fail. See *Holy Trinity Church* v. *United States,* 143 U. S. 457; *Heydenfeldt* v. *Daney Gold Mining Co.,* 93 U. S. 634, 638."

In *Helvering* v. *New York Trust Company, supra,* Mr. Justice Butler, writing the opinion for the majority of the Court, said (p. 464):

> "The rule that where the statute contains no ambiguity, it must be taken literally and given effect according to its language, is a sound one not to be put aside to avoid hardships that may sometimes result from giving effect to the legislative purpose. *Commissioner of Immigration* v. *Gottlieb,* 265 U. S. 310, 313; *Bate Refrigerator Co.* v. *Sulzberger,* 157 U. S. 1. But the expounding of a statutory provision strictly according to the letter without regard to other parts of the Act and legislative history would often defeat the object intended to be accomplished. Speaking through Chief Justice Taney in *Brown* v. *Duchesne,* 19 How. 183, this Court said (p. 194): 'It is well settled that, in interpreting a statute, the Court will not look merely to a particular clause in which general words may be used, but will take in connection with it the whole statute (or statutes on the same subject) and the objects and policy of the law, as indicated by its various provisions, and give to it such a construction as will carry into execution the will of the Legislature, as thus ascertained, according to its true intent and meaning.' * * *.
>
> In *Barret* v. *Van Pelt,* 268 U. S. 85, this Court applied the rule laid down in *People ex rel. Attorney General* v. *Utica Ins. Co.,* 15 Johns. 358, 381, that 'a thing which is within

> the intention of the makers of a statute is as much within the statute as if it were within the letter, and a thing which is within the letter of the statute, is not within the statute, unless it is within the intention of the makers * * *.' "

In *Ebert* v. *Poston, supra,* Mr. Justice Brandeis, in the opinion of the Court, stated (p. 554):

> "The judicial function to be exercised in construing a statute is limited to ascertaining the intention of the legislature therein expressed. A *casus omissus* does not justify judicial legislation."

When we pause to consider the circumstances under which Congress enacted 77B, we find that at the time of its enactment an unusual number of bankruptcy proceedings, voluntary and involuntary, were pending. In addition thereto a great many general equity receiverships, as that phrase has been commonly understood and accepted by the Bench and Bar, were in existence. Like in bankruptcy, the end sought in these receiverships, was the liquidation of the assets and their equitable distribution among creditors (see *Gordon* v. *Washington,* 295 U. S. 30, 38). It was the plan of the Congress to prevent this very condition that Section 77B was enacted. The legislative history of the act[3] makes the conclu-

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[3] For the legislative history of Section 77B, *see* Friendly, *Some Comments on the Corporate Reorganizations Act,* 48 Harv. L. Rev. (1934), 39, 49, *et seq.*

As originally drafted, Section 77B (H. R. 5884) contained no provision authorizing creditors to petition for involuntary reorganizations. The bill was proposed by Mr. McKeown. When, in the course of hearings before the House Judiciary Committee, Mr. McKeown was requested to state his reasons for the absence of a provision authorizing creditors to petition for involuntary proceedings, he replied:

> "The reason we do not apply it to creditors is this: Any corporation that becomes insolvent or unable to meet its debts as they mature—the creditor has a very drastic remedy. *He has*

sion irresistible that it was this type of general equity receivership which Congress had in mind when it used this phrase in Section 77B.

A consideration of the statute as a whole leads us, it is respectfully submitted, to the same result. As may be observed, the phrase "equity receivership" immediately follows the words "a prior proceeding in bankruptcy". Again, at almost the very beginning of Section 77B (a), it provides that where the petition or answer is approved, the Court shall have and may exercise all the powers, which a Federal Court would have, had it appointed a receiver in equity of the property of the debtor, *by reason of its inability to pay its debts as they matured.*

We feel that the construction for which we contend, is made clear when we consider the incidents of a receivership in a mortgage foreclosure action. This form of action is usually based upon a default in performing the terms and conditions of a specific bond and mortgage. The ability of the corporation to pay its debts as they mature, is in no way involved in such an action. The receivership in such an action is primarily for the benefit of the plaintiff mortgagee (*Sullivan* v. *Rosson,* 223 N. Y. 217). In general, the receivership in a mortgage foreclosure action is entirely different from that which exists in a receivership which has been created because of the

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the remedy of the receivership, a Federal receivership immediately. He goes in and can put the corporation either into involuntary bankruptcy or into the hands of a receiver. For that reason we did not want to impair his rights to go in at any time, and we saw no necessity why a creditor should want to reorganize when he puts the corporation in involuntary bankruptcy *or into a receivership.* The Corporation, if it wants to reorganize, can come in and save itself." (Italics ours.) (U. S. Judiciary Committee (House) Hearings, 73 Cong. (1-2 Sess.), p. 202.)

See also House Judiciary Report on Section 77B of the Bankruptcy Act. (This report is conveniently set out in the Bankruptcy Law Service of Commerce Clearing House, Inc., pp. 857-864.) Dodd, Reorganizations through Bankruptcy: A Remedy for What? 48 Harv. L. Rev. (1935) 1100: 78 Cong. Rec. 7890, 7905-7907.

corporation's inability to meet its debts as they mature.[4]

In New York, under the old Chancery practice, the Court would not appoint a receiver in a foreclosure action unless it was satisfied that the security was inadequate for the debt, even though there is a stipulation in the mortgage providing for the appointment of a receiver (*W. I. M. Corporation* v. *Cipulo,* 216 App. Div. (New York) 46 (1926)). Subsequent to this decision, and in 1930, the New York Legislature amended the law.[5] Under the amendment it was provided that where a mortgage contained a provision for the appointment of a receiver in the event of default, such provision must be construed as meaning that the mortgagee is entitled to the appointment of a receiver, without notice and without regard to the adequacy of the security for the debt. Thus we find that in New York, since 1930, a receiver in a foreclosure action is in fact a statutory receiver, and not strictly speaking, a receiver appointed under the old Chancery practice.

The receivers appointed in the foreclosure action

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[4] In an equity receivership the orders appointing the receivers and providing for their powers usually contain an omnibus injunction restraining the prosecution of all claims against the corporation; there is provision made for the filing of claims by creditors; the marshalling of assets; the liquidation thereof and the ratable distribution among creditors. The proceeding takes on all the aspects of a bankruptcy proceeding. In a receivership in a mortgage foreclosure action we find none of these things.

[5] Laws of 1930, Chapter 166, adding subdivision 10 to Section 254, Real Property Law, which reads as follows:

"10. Mortgagee entitled to appointment of receiver. A covenant 'that the holder of this mortgage, in any action to foreclose it, shall be entitled to the appointment of a receiver,' must be construed as meaning that the mortgagee, his heirs, successors or assigns, in any action to foreclose the mortgage, shall be entitled, without notice and without regard to adequacy of any security of the debt, to the appointment of a receiver of the rents and profits of the premises covered by the mortgage; and the rents and profits in the event of any default or defaults in paying the principal, interest, taxes, water rents, assessments or premiums of insurance, are assigned to the holder of the mortgage as further security for the payment of the indebtedness."

described in the petition in the instant case, were appointed under this very subdivision. They were appointed without notice and without regard to the adequacy of any security of the debt.[6]

Prior to the enactment of Section 77B, it was held that the appointment of a receiver in a foreclosure action, did not constitute an act of bankruptcy, even though the bankruptcy act provides[7] that it is an act of bankruptcy where a receiver or a trustee has been appointed or put in charge of a person's property while he is insolvent. (See *Standard Accident Insurance Company* v. *E. T. Sheftel & Co.*, 53 Fed. (2d) 40, 41, C. C. A. 4.) Petitioners concede that there is no such thing as "a proceeding in equity receivership", and that a suit that looks merely to the appointment of an equity receiver, must be dismissed. (See *Gordon* v. *Washington, supra.*)

We respectfully submit that since there is no action or proceeding known to the law as "equity receivership" this phrase is ambiguous, and it should be given the meaning that Congress intended. It is further submitted that to construe this phrase as meaning the appointment of a receiver in any action, suit or proceeding, irrespective of the end sought, whether such receivership cover all or part of a corporation's property, does violence to the purpose and intent of Congress. It would lead to "an unreasonable result, plainly at variance with the policy of the legislation as a whole".

It is contended by petitioners that sub-division (i) of Section 77-B sustains their argument that Congress intended to include within the phrase "equity

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[6] The application of a Federal Statute very often depends upon a local law. Compare *Manhattan Properties, Inc.* v. *Irving Trust Company*, 291 U. S. 320, 335; *Philips* v. *Commissioner*, 283 U. S. 589, 602.

[7] Section 3 (a) (5) Bankruptcy Act; 11 U. S. C. A. Sec. 21 (a) (5).

receivership" the receivership in an action to foreclose a mortgage, whether it be on all or a part of the corporation's property. To us, such a construction is strained, unfair and unreasonable. Under this subdivision the petition may be filed "as provided in subdivision (a) of this section". Contrary to the statement contained in petitioners' brief, we have never urged that the receivership must exist only in a Federal Court. Our contention has always been that the receivership may be in a Federal Court or in a State Court or in a Territorial Court, but that irrespective of where it may be, it must have come into existence because the corporation was insolvent in the common law sense, namely—that it was unable to pay its debts as they matured[8] and that a receivership which came into existence for some other reason, such as a default in performing the terms of a bond and mortgage, did not satisfy the statutory requirements.

Petitioners urge that subdivision (i) expressly provides that the receivership need only cover a part, or it may cover all, of the corporation's property. In the case at bar, the petition alleges that it covers all of the property. It is submitted that the logic of their reasoning compels them to assert that even if it only covered a part of the corporation's property, the requirements of Section 77-B are satisfied.

We take the liberty to suggest a situation which might serve to illustrate the danger of sustaining petitioner's argument. The X corporation is the owner of five parcels of real estate. One of these it acquired about a year ago, with the hope that it might

[8]In addition to the equity receiverships in the Federal Court, we respectfully ask the Court to consider the same type of receivership which exists in New Jersey and other states. The latter come into existence because of the inability of the corporation to pay its debts as they matured, and have all of the characteristics of a Federal equity receivership.

prove profitable. At the time of its acquisition, the corporation executed no bond, mortgage or extension agreement, in which it became obligated to pay the mortgage indebtedness, or any part thereof. It assumed none of the obligations with respect to this parcel, but purchased the same subject to all the liens and encumbrances thereon. After one year of operation, the corporation finds this parcel to be unprofitable. It is perfectly willing to let it fall by the wayside. The corporation is eminently solvent, though temporarily embarrassed for lack of cash. In connection with this particular parcel, the holder of a mortgage thereon has a right to apply *ex parte* for the appointment of a receiver. The receiver is appointed. The corporation is not in need of any reorganization. A great many of its creditors are satisfied that it is to the best interests of all concerned to keep the corporation out of court. *Quaere*: Was it the intention of Congress, under the assumed facts, to confer upon creditors the right to subject this corporation and its property to the jurisdiction of a bankruptcy court?

Petitioners assert that subdivision (i) specifically covers such a case, because it is an equity receivership covering a part of the corporation's property. This subdivision, however, was enacted, it seems to us, to cover the case of a chain store corporation, having property in more than one state. If an equity receivership came into existence in one state, covering only a part of the corporation's total property, that condition would satisfy the statutory requirement. As the Court of Appeals said in the case at bar (R. 33-34):

> "In the case at bar the mortgage covered all the debtor's property, but the logic of the ap-

> pellants' position, as they concede, compels them to argue for the same results however small a portion of the debtor's property may be involved in foreclosure. Subdivision (i), it is true, refers to the appointment of all or any part of the property of a corporation. This, we think, contemplates a situation where the corporation may have property outside the jurisdiction of the appointing court, in which case only part of its property could be in equity receivership without ancillary proceedings."

The law was enacted primarily "for relief of debtors" (77-A). To permit three creditors holding claims of just above $1,000, to file an involuntary petition under 77-B, under the hypothetical case, would lead to an absurd and impractical result. The corporation would probably be doing more to help its creditors by abandoning the particular property (or by selling the deed for a nominal sum) than it would be doing if it attempted to retain the property and the burdens that go with it. We hope no court shall ever approve the unscrupulous use of the involuntary petition under such circumstances. It seems to us that the petitioners' whole argument is based upon the false assumption that the equity foreclosure receivership came into existence because the corporation was unable to meet its debts as they matured. They assert that the foreclosure of a corporation's property is usually "a symptom of financial distress". As we have pointed out in the hypothetical case, the assumption is unreasonable.

It is further urged by petitioners that the creditors should not be left to the mercy of the debtor's own board of directors, which through deadlock or other motives, may be unwilling or unable to help. We

hope that the court will not indulge in such an improbable presumption. If the corporation finds it necessary to avail itself of Section 77-B, the statute makes ample provision for its invocation, without the necessity of alleging "a pending equity receivership". If the corporation does not desire to avail itself of Section 77-B, the creditor is not without a remedy, for that section did not in any way repeal the bankruptcy act, but merely conferred additional jurisdiction pursuant to its provisions, upon the Bankruptcy Court. After all, a fair and reasonable view requires the conclusion that a corporation will always take such steps as the law provides, for the conservation, preservation and protection of its desirable property.

We are unable to say, with certainty, whether or not the decision of the Circuit Court of Appeals for the Seventh Circuit, in the case of *In re Granada Hotel Corporation, supra,* is in conflict with the decision of the Court of Appeals in the case at bar. If the basis of the receivership in the *Granada* case, was the inability of the corporation to pay its debts as they matured, then we respectfully submit that the decision is not in conflict with the case at bar. We have observed that in the *Granada* case, the foreclosure receiver had been discharged and the property turned over to the trustee under the mortgage indenture, pursuant to an order of the Court. Just what the provisions of this order were, we are unable to say.

CONCLUSION.

The decision of the Circuit Court of Appeals construing the phrase "equity receivership" to mean a receivership which came into existence because of the inability of the corporation to pay its debts as they matured, is correct. We are unable to say whether there is a conflict of decisions upon that question. Since the question in the case at bar is purely academic, we oppose the petition and respectfully urge that it should be denied.

Dated, New York, November 12th, 1935.

Respectfully submitted,

DANIEL A. SHIRK,
EDWIN R. WOLFF,
Counsel for Respondents.

APPENDIX.

Section 77-B (a) Bankruptcy Act as amended, Title 11 U. S. C. A., Section 207 (a), provides as follows:

> "Three or more creditors who have probable claims against any corporation which amount in the aggregate, in excess of the value of securities held by them, if any, to $1,000 or over may, if such corporation has not filed a petition or answer under this section, file with the court in which such corporation might file a petition under this section, a petition stating that such corporation is insolvent or unable to meet its debts as they mature and, *if a prior proceeding in bankruptcy or equity receivership is not pending,* that it has committed an act of bankruptcy within four months, that such creditors propose that it shall effect a reorganization; and such corporation shall, within ten days after the service of a copy of such petition upon it, answer such petition." (Italics ours.)

Section 77-B (i), 11 U. S. C. A., Section 207 (i), provides:

> "If a receiver or trustee of all or any part of the property of a corporation has been appointed by a Federal, State or Territorial court * * *, a petition or answer may be filed under this section and any time thereafter by the corporation, or its creditors as provided in subdivision (a) of this section * * *."

Section 3 (a) (5) Bankruptcy Act, 11 U. S. C. A., Section 21 (a) (5), provides:

> "ACTS OF BANKRUPTCY. (a) Acts of bank-

ruptcy of a person shall consist of his * * *; or (5) made a general assignment for the benefit of his creditors, or, while insolvent, a receiver or a trustee has been appointed, or put in charge of his property; * * *."

Section 1 (15) Bankruptcy Act, 11 U. S. C. A., Section 1 (15), provides as follows:

"Section 1, MEANING OF WORDS. The words and phrases used in this title and in proceedings pursuant hereto shall, unless the same be inconsistent with the context, be construed as follows: * * * (15) a person shall be deemed insolvent within the provisions of this title whenever the aggregate of his property, exclusive of any property which he may have conveyed, transferred, concealed or removed, or permitted to be concealed or removed, with intent to defraud, hinder or delay his creditors, shall not, as a fair valuation, be sufficient in amount to pay his debts * * *."

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Supreme Court of the United States

OCTOBER TERM, 1935.

No. 533.

DUPARQUET HUOT & MONEUSE CO., E. E. ALLEY CO., INC., and H. B. DAY CO., INC.,

Petitioners,

vs.

FRYSINGER EVANS, DU-WEL CLEANING CONTRACTING CO., GREENLEIGH PRINTING CO., INC., and GRAMERCY QUALITY LAUNDRY CO., INC.,

Respondents.

RESPONDENTS' BRIEF.

DANIEL A. SHIRK,
EDWIN R. WOLFF,
Counsel for Respondents.

THE COURT PRESS, N. Y. C.

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Supreme Court of the United States

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VS.

FRYSINGER EVANS, DU-WEL CLEANING CONTRACTING CO., GREENLEIGH PRINTING CO., INC., and GRAMERCY QUALITY LAUNDRY CO., INC.,

Respondents.

RESPONDENTS' BRIEF.

Opinions Below.

The opinion of the District Court (R. 10-11) is reported in 11 Fed. Supp. 404. The opinion of the Circuit Court of Appeals (R. 17-21) is reported in 78 Fed. 2d 678.

Jurisdiction.

This Court granted a petition for certiorari on November 25th, 1935 (R. 23). U. S. ; 56 Sup. Ct. 248. Jurisdiction of this Court rests upon Section 240 (a) of the Judicial Code, as amended by the Act of February 13th, 1925 (28 U. S. C. A. 347).

Statement of the Case.

The statement of the case made by petitioners, correctly sets forth the material facts. In addition to the statement made, it may be noted from the

schedule annexed to the petition that the total unsecured debts, listed as accounts payable, are set forth as $3,375.31 (R. 7), of which the petitioners herein allege they are due a sum in excess of $1,000 (R. 4). The petition for adjudication was dismissed on motion of other creditors of the debtor corporation (R. 7-9).

Question Presented.

Is a mortgage foreclosure action involving real estate, in which a Receiver has been appointed to collect the rents and profits for the benefit of the plaintiff in said action, an "equity receivership" within the meaning of Section 77-B of the Bankruptcy Act?

Statutes Involved.

These are set forth in the Appendix (*infra,* pp. 18-19).

Summary of Argument.

A mortgage foreclosure action in which a receiver to collect rents has been appointed for the benefit of the plaintiff and other lien holders, is not an equity receivership within the meaning of the Statute. It is the duty of this Court to give effect to the intent of Congress; that primarily this intent is to be ascertained by giving the words used their natural and literal significance; but that if this leads to an unreasonable result, plainly at variance with the policy of the legislation as a whole, rules of construction require further investigation into the reason of the enactment and its history; that the Statute will be given the effect that Congress intended, sacrificing, if necessary, the literal meaning; that other parts of the

statute must be considered, and that a construction, strictly according to the letter, without regard to the legislative intent, is not to be desired.

The phrase "equity receivership" has a common acceptation and usage. It refers to an action in which, on the bill of a creditor or a stockholder of the corporation, a receiver is appointed to save the business, if possible, or to liquidate and distribute ratably the assets among all creditors. There is a well defined distinction between a receiver of a corporation or over the property of a corporation, and a receiver to collect rents in a foreclosure action. Unless the phrase "equity receivership" is given the meaning that the Bench and Bar have understood it to mean, and which it is to be presumed Congress intended it to mean, it leads us to an unreasonable result. Since it is conceded that there is no such thing as a proceeding in equity receivership, the phrase is ambiguous and subject to construction.

Argument.

A mortgage foreclosure action in which a receiver to collect rents has been appointed for the benefit of the plaintiff and other lien holders, is not an "equity receivership" within the meaning of Section 77-B.

Under Section 77-B, sub-division (a), three creditors having claims amounting to $1,000 or over, may file "a petition stating (among other things) that such corporation is insolvent or unable to meet its debts as they mature and, *if a prior proceeding in bankruptcy or equity receivership is not pending,* that it has committed an act of bankruptcy within four months". Sub-division (i) of the same section further provides: "If a receiver or trustee of all or any part of the property of a corporation has been

appointed by a Federal, State or territorial Court * * * a petition or answer may be filed under this Section, at any time thereafter by the corporation, or its creditors, as provided in sub-division (a) of this section."

The single question presented on this appeal hinges upon the definition to be given to the words "equity receivership" to be found in sub-division (a).

In the case at bar petitioners allege they have provable claims against the corporation, in excess of $1,000 (R. 2); that the corporation was unable to meet its debts as they matured, and that it had committed an act of bankruptcy within four months preceding the filing of the petition (R. 4). It was conceded by petitioners in both Courts below, and is now conceded in petitioners' brief (p. 4), that the petition does not allege an act of bankruptcy. They insist, however, that there are sufficient allegations of fact set forth in the petition to show that there was *an equity receivership pending* within the meaning of the Statute. Succinctly, these facts consist of the allegation that receivers were appointed by the Supreme Court of the State of New York in a mortgage foreclosure action effecting property of the corporation, and that these receivers were receiving and administering the income *for the benefit of the plaintiff in that action* (R. 3). It may be noted that if this mortgage foreclosure action in which the receivers were appointed, is an *equity receivership,* then the necessity of alleging an act of bankruptcy does not exist.

The District Court and the Court of Appeals decided that these words were subject to construction; that they referred to a receivership of the general type, known as the conservation suit, or where a stockholder has brought a bill in equity; that during

the progress of the bill Congress was familiar with this type of receivership; that the phrase is used in apposition to the clause "a prior proceeding in bankruptcy"; that the rule of *ejusdem generis* is applicable; that this form of receivership, where the business cannot be saved, like bankruptcy, looks to a liquidation of assets and an equitable distribution among creditors; that the legislative plan was to aid a distressingly large number of corporations which had been or were in danger of being placed in bankruptcy or equity receivership of the general type described, and that the purpose of the legislation was to supersede proceedings looking to liquidation by proceedings looking to reorganization. Accordingly, it was held that a mortgage foreclosure action in which a receiver was appointed, was not an equity receivership (R. 10-11, 17-21).

The same conclusion was reached by another District Court in *In re Draco Realty Corp.* (D. C. S. D. N. Y.), 11 Fed. Supp. 405. See also *In re Laclede Gas Light Co.* (D. C. E. D. Mo. June 26, 1934, not offically reported).[1] Opposed to these decisions are three cases arising in the Eastern District of Illinois, wherein Judge Lindley held that a mortgage foreclosure suit in which receivers were appointed to be an "equity receivership" within the meaning of Section 77-B. *In re Flamingo Hotel Co.*[2] (Aug. 9, 1934,

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1 This opinion appears in the bankruptcy law service of Commerce Clearing House, Inc., pages 1101-1103, paragraph 3001.

2 Friendly, in *Some Comments on the Corporate Reorganizations Act*, 48 Harv. L. Rev. (1934) 39, 54 (Note 57), states his view of the conflict between the *Laclede* and the *Flamingo* cases as follows:

> "* * * The decision in the *Flamingo Hotel* case, E. D. Ill., Aug. 9, 1934 is *contra*. *It is submitted that the Laclede decision is correct, and that the term 'equity receivership' should be restricted to proceedings initiated by the filing of a general creditor's bill* and should not be applied to proceedings purely for the enforcement of liens even though such proceedings involve the appointment of a receiver of the property subject to the lien." (Italics ours.)

not officially reported); *In re Surf Bldg. Corp.* (Oct. 17, 1934, not officially reported); and *In re Granada Hotel Corp.* (D. C.), 9 Fed. Supp. 909. The case last cited has been affirmed by the Circuit Court of Appeals for the Seventh Circuit, in a short per curiam opinion, 78 F. (2d) 409 (rehearing denied July 26, 1935).

The *Granada Hotel* case is now before this Court *sub nom. Tuttle* v. *Harris,* No. 428, and the argument of which, it is expected, will precede that of the case at bar.

In the Construction of a Statute the Intent of Congress Must be Given Effect.

Ozawa v. *United States,* 260 U. S. 178, 194;
Helvering v. *New York Trust Company,* 292 U. S. 455, 464;
Ebert v. *Poston,* 266 U. S. 548, 554.

In the *Ozawa* case, *supra,* Mr. Justice Sutherland, in the opinion of the Court, stated (p. 194):

> "It is the duty of this Court to give effect to the intent of Congress. Primarily this intent is ascertained by giving the words their natural significance, but if this leads to an unreasonable result, plainly at variance with the policy of the legislation as a whole, we must examine the matter further. We may then look into the reason of the enactment and inquire into its antecedent history, and give it effect in accordance with its design and purpose, sacrificing, if necessary, the literal meaning in order that the purpose may not fail. See *Holy Trinity Church* v. *United States,* 143 U. S. 457; *Heydenfeldt* v. *Daney Gold Mining Co.,* 93 U. S. 634, 638."

In *Helvering* v. *New York Trust Company, supra,* Mr. Justice Butler, writing the opinion for the majority of the Court, said (p. 464):

> "The rule that where the statute contains no ambiguity, it must be taken literally and given effect according to its language, is a sound one not to be put aside to avoid hardships that may sometimes result from giving effect to the legislative purpose. *Commissioner of Immigration* v. *Gottlieb,* 265 U. S. 310, 313; *Bate Refrigerator Co.* v. *Sulzberger,* 157 U. S. 1. But the expounding of a statutory provision strictly according to the letter without regard to other parts of the Act and legislative history would often defeat the object intended to be accomplished. Speaking through Chief Justice Taney in *Brown* v. *Duchesne,* 19 How. 183, this Court said (p. 194): 'It is well settled that, in interpreting a statute, the Court will not look merely to a particular clause in which general words may be used, but will take in connection with it the whole statute (or statutes on the same subject) and the objects and policy of the law, as indicated by its various provisions, and give to it such a construction as will carry into execution the will of the Legislature, as thus ascertained, according to its true intent and meaning.' * * *.
>
> In *Barret* v. *Van Pelt,* 268 U. S. 85, this Court applied the rule laid down in *People ex rel. Attorney General* v. *Utica Ins. Co.,* 15 Johns. 358, 381, that 'a thing which is within the intention of the makers of a statute is as much within the statute as if it were within the letter, and a thing which is within the letter of the statute, is not within the statute, unless it is within the intention of the makers * * *.'"

In *Ebert* v. *Poston, supra,* Mr. Justice Brandeis, in the opinion of the Court, stated (p. 554):

> "The judicial function to be exercised in construing a statute is limited to ascertaining the intention of the legislature therein expressed. A *casus omissus* does not justify judicial legislation."

The Legislative History of the Act Confirms the View That the Phrase "Equity Receivership" Was Employed in Its Common Acceptation and Usage.

When we pause to consider the conditions which existed when the statute was enacted, we find that an unusual number of bankruptcy proceedings, voluntary and involuntary, were pending. In addition thereto, a great many general equity receiverships, as we ask the Court to construe that phrase, and as it has been commonly understood and accepted by the Bench and Bar, were in existence. Something had to be done to evolve a plan for the benefit mainly of the corporation.

Bankruptcy and equity receivership, where the business cannot be saved, contemplated the liquidation of the assets and other equitable distribution among creditors, all at a great loss and sacrifice, not only to creditors, but to the corporation itself. It was the design and purpose of the Courts to prevent this very condition that the statute was enacted. The legislative history[3] of the act makes the conclusion

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[3] For the legislative history of Section 77B, *see* Friendly, *Some Comments on the Corporate Reorganizations Act*, 48 Harv. L. Rev. (1934), 39, 49, *et seq.*

As originally drafted, Section 77B (H. R. 5884) contained no provision authorizing creditors to petition for involuntary reorganizations. The bill was proposed by Mr. McKeown. When, in the course of hearings before the House Judiciary Committee, Mr. McKeown was requested to state his reasons for the absence of a provision authorizing creditors to petition for involuntary proceedings, he replied:

> "The reason we do not apply it to creditors is this: Any corporation that becomes insolvent or unable to meet its debts as

irresistible that it was a receivership which effected such a result, that Congress had in mind when it used this phrase in Section 77-B, and that a Receiver to collect rents in a mortgage foreclosure action was not intended or contemplated.

A consideration of the statute as a whole leads us, it is respectfully submitted, to the same result. As may be observed, the phrase "equity receivership" immediately follows the words "a prior proceeding in bankruptcy". Again, at almost the very beginning of Section 77-B, subdivision (a) it provides that where the petition or answer is approved, the Court shall have and may exercise all the powers which a Federal Court would have, had it appointed a Receiver in equity of the property of the debtor, by reason of its inability to pay its debts as they matured.

The Reasons for the Appointment of a Foreclosure Receiver and for a General Equity Receiver are Firmly Embedded in the Law.

We submit that the construction for which we contend is made clear when we consider the respective powers, duties and rights of a receiver in a mortgage foreclosure action, with those of a general receiver.

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they mature—the creditor has a very drastic remedy. *He has the remedy of the receivership, a Federal receivership immediately.* He goes in and can put the corporation either into involuntary bankruptcy or into the hands of a receiver. For that reason we did not want to impair his rights to go in at any time, and we saw no necessity why a creditor should want to reorganize when he puts the corporation in involuntary bankruptcy *or into a receivership.* The Corporation, if it wants to reorganize, can come in and save itself." (Italics ours.) (U. S. Judiciary Committee (House) Hearings, 73 Cong. (1-2 Sess.), p. 202.)

See also House Judiciary Report on Section 77B of the Bankruptcy Act. (This report is conveniently set out in the Bankruptcy Law Service of Commerce Clearing House, Inc., pp. 857-864.) Dodd, Reorganizations through Bankruptcy: A Remedy for What? 48 Harv. L. Rev. (1935) 1100; 78 Cong. Rec. 7890, 7905-7907.

In New York, under the old Chancery practice, the Court would not appoint a Receiver in a foreclosure action unless it was satisfied that the person liable for the debt was insolvent, or that the security was inadequate, even though there was a stipulation in the mortgage providing for the appointment of a receiver. (*W. I. M. Corporation* v. *Cipulo,* 216 App. Div. (N. Y.) 46 (1926).) Subsequent to this decision, and in 1930, the law was amended. Under the amendment it was provided that where a mortgage contained a provision for the appointment of a Receiver in the event of default, such provision *must* be construed as meaning that the mortgagee is entitled to the appointment of a receiver, *without notice and without regard to the adequacy of the security for the debt.* (Section 254, subdivision 10, Real Property Law of the State of New York, added by Chapter 166, laws of 1930;[4] *Home Title Insurance Co.* v. *Isaac Sherman Holding Corporation,* 240 App. Div. (N. Y.) 851 (1933).) Thus the appointment of a receiver in a foreclosure action is very often determined by the provisions of the mortgage.

The receivers appointed in the foreclosure action described in the petition in the instant case, were appointed under this very subdivision. These receivers are not receivers of the property of the cor-

---

[4] Laws of 1930, Chapter 166, adding subdivision 10 to Section 254, Real Property Law, provides:

> "10. Mortgagee entitled to appointment of receiver. A covenant 'that the holder of this mortgage, in any action to foreclose it, shall be entitled to the appointment of a receiver,' must be construed as meaning that the mortgagee, his heirs, successors or assigns, in any action to foreclose the mortgage, shall be entitled, without notice and without regard to adequacy of any security of the debt, to the appointment of a receiver of the rents and profits of the premises covered by the mortgage; and the rents and profits in the event of any default or defaults in paying the principal, interest, taxes, water rents, assessments or premiums of insurance, are assigned to the holder of the mortgage as further security for the payment of the indebtedness."

poration, as that phrase was intended by Congress in subdivision (i). They are receivers to collect rents and profits, and as the record shows, for the benefit of the plaintiff in the foreclosure action, the parties thereto and those for whose benefit the receivership is extended. (See *Freedman's Savings & Trust Company* v. *Shepherd,* 127 U. S. 494, followed in *Sullivan* v. *Rosson,* 223 N. Y. 217.) The object of the appointment of such a receiver is to preserve the property *pendente lite* and to give a priority of lien on the rents and profits of the premises, so that they may be applied to payment of plaintiff's claim. (*Worthen Co.* v. *Kavanaugh,* 295 U. S. 56, 62; *Gillette* v. *Moody,* 3 N. Y. 479; *Porter* v. *Williams,* 9 N. Y. 142.) Such a receiver does not take possession of all of the assets of the corporation in the district of the appointing court, nor is he entitled to the possession of the books and records of the corporation. If the mortgage covered ten parcels of real property, and a receiver of one parcel would be sufficient protection for him, then a receiver of only that parcel will be appointed. (*Hollenbeck* v. *Donnell,* 94 N. Y. 342.) Such a receiver cannot sue for the recovery of the property, debts and things in action of the corporation. He does not represent the creditors of the corporation or its stockholders. His activities are confined to the preservation of the property pending the foreclosure action, the collection of the rents for the benefit of the plaintiff, in case there is a deficiency and for the benefit of other specific lienholders who are parties to the action in case there is a surplus. We submit that by no stretch of the imagination can he be logically considered a receiver of the corporation or over its property.

In an equity receivership, we find an entirely different situation. There the receiver takes posses-

sion of all of the property of the corporation in the district of the appointing court; creditors secured and unsecured are restrained from prosecuting actions against the corporation; provision is made for the filing of claims by creditors; for the marshalling of assets, and if there is no hope for saving the business, the liquidation thereof and the ratable distribution among creditors. The proceeding takes on all the aspects of a bankruptcy proceeding.

A foreclosure receiver is not unlike a receiver appointed in supplementary proceedings. In the former case, the appointment is made primarily for the benefit of the plaintiff in the foreclosure action, and in the latter case his appointment is made for the benefit of the creditor who procured his appointment, and such others as may have caused the receivership to be extended to their claims. *Stephens* v. *Meriden Britania Co.,* 160 N. Y. 178, 183. An equity receiver acts for the benefit of all creditors of the corporation, irrespective of how his appointment came about. *United States Trust Co.* v. *N. Y., West Shore and Buffalo Rwy. Co.;* 101 N. Y. 478.

Aside from the inherent power of a court of equity to appoint a general receiver in a proper case, the statutes of New York elaborately provide for the judicial supervision of a corporation by a receiver. (See Articles 6 and 10, General Corporation Law, State of New York, Chapter 23, Consolidated Laws.) Almost every other state contains similar statutes. In the case at bar, the foreclosure receiver was appointed because of a stipulation in the mortgage providing for such appointment, and he was not a general receiver such as a court of equity appoints in the judicial supervision of a corporation, or which the statutes of the various states provide for.

We approach a solution of the problem from another angle. As may be noted from the record, the foreclosure action was commenced on or about October 15th, 1934, and the receivers were appointed and went into possession on or about December 19th, 1934 (R. 3), which was long before the filing of the petition for adjudication. Had the corporation filed a voluntary petition in bankruptcy, it is settled that the trustee in bankruptcy would not be entitled to possession of the property or of the rents and profits which the foreclosure receivers had collected and were collecting. (See *In re Brose,* 254 F. 664 (C. C. A. 2); *In re Berdick,* 56 Fed. (2d) 288; *Lincoln Savings Bank* v. *Realty Associates,* 67 Fed. (2d) 895 (C. C. A. 2).)

Had the receivers in possession been general equity receivers in an insolvency proceeding, the supervening bankruptcy of the corporation would immediately oust the State Court of jurisdiction, under the now settled principle that the bankruptcy law is paramount, and the jurisdiction of the Federal Courts in bankruptcy is exclusive in the administration of the affairs of insolvent persons and corporations. (*Gross* v. *Irving Trust Company,* 289 U. S. 342; *In re Watts & Sachs,* 190 U. S. 1.). The reason for this is manifest. The appointment of a foreclosure receiver is primarily for the parties to the foreclosure action, who are usually holders of specific liens against the property, while the appointment of a general equity receiver is for the benefit of all creditors and stockholders. (See also *Harkin* v. *Brundage,* 276 U. S. 36.)

Prior to the enactment of Section 77-B, it was held that the appointment of a receiver in a foreclosure action did not constitute an act of bankruptcy,

even though the bankruptcy act[5] provides that it is an act of bankruptcy where a receiver has been put in charge of a person's property, while he is insolvent. (See *Standard Accident Insurance Co.* v. *E. T. Sheftel & Co.*, 53 Fed. (2d) 40-41, C. C. A. 4.)

Petitioners concede that there is no such thing as a proceeding in equity receivership, and that a suit that looks merely to the appointment of an equity receiver must be dismissed (*Gordon* v. *Washington*, 295 U. S. 30, 38). We submit that since there is no such proceeding as equity receivership, the phrase is ambiguous, and it should be given the meaning that Congress intended. This Court, in the case of *Continental Illinois National Bank & Trust Co.* v. *Chicago, Rock Island & Pacific Railway Co.*, 294 U. S. 648, 672, has used this phrase "equity receivership" to represent, we believe, the type of action that, we urge, Congress intended.

Subdivision (i) Was Enacted to Cover the Case of a Corporation Having Property Outside of the Jurisdiction of the Appointing Court.

It is contended that subdivision (i) indicates an intent on the part of Congress to embrace within the provisions of Section 77-B, a receiver appointed in a foreclosure action. It will be recalled that by this section, a petition *under subdivision* (*a*) may be filed by creditors, where a receiver or trustee of all or any part of the property of a corporation has been appointed by a Federal, State or Territorial Court.

It seems clear to us that subdivision (i) was enacted to cover the case of a chain store corporation, having property in more than one state. If an equity

[5] Section 3 (a) (5) Bankruptcy Act; 11 U. S. C. A. Sec. 21 (a) (5) (Appendix, *infra*).

receivership came into existence in one state, covering only a part of the corporation's total property, that condition would satisfy the statutory requirements. As the Court of Appeals said in the case at bar (R. 20-21):

> "In the case at bar the mortgage covered all of the debtor's property, but the logic of the appellant's position as they concede, compels them to argue for the same results, however small a portion of the debtor's property may be involved in foreclosure. Subdivision (i), it is true refers to the appointment of all or any part of the property of a corporation. This, we think, contemplates a situation where the corporation may have property outside the jurisdiction of the appointing court, in which case only part of its property could be in equity receivership without ancillary proceedings."

Section 77-B Was Enacted for the Relief of Debtors.

We respectfully submit that to construe the phrase "equity receivership" as meaning the appointment of a receiver in any action, suit or proceeding, irrespective of the end sought, does violence to the purpose and intent of Congress. It would lead to "an unreasonable result, plainly at variance with the policy of the legislation as a whole". The law was enacted primarily "for relief of debtors" (Section 77-A).

We take the liberty to suggest a situation which might serve to illustrate the danger of sustaining petitioners' argument. The X corporation is the owner of five parcels of real estate. One of these it acquired about a year ago, with the hope that it might prove profitable. At the time of its acquisition, the corporation executed no bond, mortgage or agree-

ment, in which it became obligated to pay the mortgage indebtedness. It assumed none of the obligations with respect to this parcel, but purchased the same subject to all the liens and encumbrances thereon. After one year of operation, the corporation finds the retention of this parcel to be unprofitable. It is perfectly willing to let it fall by the wayside. The corporation is eminently solvent, though temporarily embarrassed for lack of cash. In connection with this particular parcel, the holder of a mortgage thereon has a right to apply *ex parte* for the appointment of a receiver, to collect rents. The receiver is appointed. The corporation is not in need of any reorganization. A great many of its creditors are satisfied that it is to the best interests of all concerned to keep the corporation out of court. *Quaere*: Was it the intention of Congress, under the assumed facts, to confer upon creditors the right to subject this corporation and its property to the jurisdiction of a bankruptcy court?

Petitioners argue, however, that other provisions of the statute protect the corporation. It is said that the "good faith" provision is a safeguard against the haphazard or unscrupulous use of the involuntary petition. In reply, we ask why the corporation under the hypothetical case should even be subjected to the expense of defending that issue. In such case a corporation would probably be doing more to help its creditors by abandoning the particular property or by selling the deed for a nominal sum, than it would be doing if it attempted to retain the property and the burdens that go with it.

It is further urged by petitioners that the creditors should not be left to the mercy of the debtor's own board of directors, which "through dead-lock, lack of direct interest, other motives or mere indolence" may be finable or unwilling to help them. We hope that the court will not indulge in such an im-

probable presumption. If the corporation finds it necessary to avail itself of Section 77-B, the statute makes ample provision for its invocation, without the necessity of alleging "a pending equity receivership". If the corporation does not desire to avail itself of this section, the creditor is not without a remedy, for that section did not in any way repeal the bankruptcy act, or take away from the creditor the right to have appointed a general equity receiver, but merely conferred additional jurisdiction pursuant to its provisions, upon the Bankruptcy Court. After all, a fair and reasonable view requires the conclusion that a corporation will always take such steps as the law provides for the conservation, preservation and protection of its desirable property.

The case at bar is probably the best illustration of the danger of petitioners' argument. The corporation, it has been adjudicated by the Supreme Court of the State of New York, was a mere trustee for the benefit of others, of the property, which was the subject matter of the foreclosure action; that it had no beneficial interest in the property. Since the decision by the Circuit Court of Appeals in this case, the foreclosure action has been discontinued and the receivers to collect the rents have been discharged and the property is now being operated for the benefit of the real owners (see *In re Commonwealth Bond Corp.*, 77 F. (2d) 308).

CONCLUSION.

The decision of the Circuit Court of Appeals should be affirmed.

Dated, New York, January 11th, 1936.

Respectfully submitted,

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EDWIN R. WOLFF,
Counsel for Respondents.

Appendix.

Section 77-B (a) Bankruptcy Act as amended, Title 11 U. S. C. A., Section 207 (a), provides, so far as material, as follows:

> "* * * If the petition or answer is so approved, an order of adjudication in bankruptcy shall not be entered and the court in which such order approving the petition or answer is entered shall, during the pendency of the proceedings under this section, have exclusive jurisdiction of the debtor and its property wherever located for the purposes of this action, and shall have and may exercise all the powers, not inconsistent with this section, which a Federal court would have had it appointed a receiver in equity of the property of the debtor by reason of its inability to pay its debts as they mature."
>
> * * *
>
> "Three or more creditors who have probable claims against any corporation which amount in the aggregate, in excess of the value of securities held by them, if any, to $1,000 or over may, if such corporation has not filed a petition or answer under this section, file with the court in which such corporation might file a petition under this section, a petition stating that such corporation is insolvent or unable to meet its debts as they mature and, *if a prior proceeding in bankruptcy or equity receivership is not pending,* that it has committed an act of bankruptcy within four months, that such creditors propose that it shall effect a reorganization; and such corporation shall, within ten days after the service of a copy of such petition upon it, answer such petition." (Italics ours.)

Section 77-B (i), 11 U. S. C. A., Section 207 (i), provides:

> "If a receiver or trustee of all or any part of the property of a corporation has been appointed by a Federal, State or Territorial court * * *, a petition or answer may be filed under this section and any time thereafter by the corporation, or its creditors as provided in subdivision (a) of this section * * *."

Section 3 (a) (5) Bankruptcy Act, 11 U. S. C. A., Section 21 (a) (5), provides:

> "ACTS OF BANKRUPTCY. (a) Acts of bankruptcy of a person shall consist of his * * *; or (5) made a general assignment for the benefit of his creditors, or, while insolvent, a receiver or a trustee has been appointed, or put in charge of his property; * * *."

Section 1 (15) Bankruptcy Act, 11 U. S. C. A., Section 1 (15), provides as follows:

> "SECTION 1, MEANING OF WORDS. The words and phrases used in this title and in proceedings pursuant hereto shall, unless the same be inconsistent with the context, be construed as follows: * * * (15) a person shall be deemed insolvent within the provisions of this title whenever the aggregate of his property, exclusive of any property which he may have conveyed, transferred, concealed or removed, or permitted to be concealed or removed, with intent to defraud, hinder or delay his creditors, shall not, as a fair valuation, be sufficient in amount to pay his debts * * *."

pp: 5 • 6 • 1

SUPREME COURT OF THE UNITED STATES.

No. 533.—October Term, 1935.

Duparquet Huot & Moneuse Co., E. E. Alley Co., Inc., and H. B. Day Co., Inc., Petitioners,
vs.
Frysinger Evans, Du-Wel Cleaning Contracting Co., Greenleigh Printing Co., Inc., et al., Respondents.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[February 3, 1936.]

Mr. Justice Cardozo delivered the opinion of the Court.

The question is whether a receivership for the collection of rents and profits in a suit for the foreclosure of a mortgage is an "equity receivership" within the meaning of section 77B of the Bankruptcy Act providing for the reorganization of debtor corporations in involuntary proceedings.

In 1934 and afterwards, "2168 Broadway Corporation" was the owner of a large hotel in the City of New York, and of the fixtures and furniture contained therein. It had no other property. The holder of a mortgage on the hotel began an action of foreclosure and procured the appointment of receivers to collect the rents and profits. Soon after that appointment, three creditors of the corporation, holding claims a little in excess of $1,000, filed a petition in a District Court of the United States for the reorganization of the corporate debtor in accordance with § 77B of the Bankruptcy Act, alleging that the value of the assets was largely in excess of the liabilities, but that the debtor was unable to pay its debts as they matured. The District Court dismissed the petition on the ground that submission to the receivership in the suit for foreclosure was not an act of bankruptcy and did not relieve the ~~debtor~~ from showing in ~~its~~ petition that such an act had been committed. 11 F. Supp. 404. The Circuit Court of Appeals for the Second Circuit affirmed (78 F. (2d) 678), declining to follow a decision in the Seventh Circuit which upheld a different conclusion. *In re Granada Hotel Corporation*, 78 F. (2d) 409; affirming 9 F.

Supp. 909. Because of this conflict and because of the importance of removing doubt as to the meaning of the statute a writ of certiorari was granted by this court.

Section 77B of the Bankruptcy Act, which took effect as law on June 7, 1934 (Act of June 7, 1934, 48 Stat. 911, 912; 11 U. S. C., § 207) provides for two classes of proceedings, voluntary and involuntary. Any corporation, with exceptions not now important, may file a petition stating that it is insolvent or presently unable to meet maturing obligations, and that it desires to effect a plan of reorganization. If the petition is approved, the court assuming jurisdiction shall have and may exercise all the powers, unless specially withdrawn, "which a Federal court would have had it appointed a receiver in equity of the property of the debtor by reason of its inability to pay its debts as they mature." § 77B (a). But jurisdiction is not confined to proceedings initiated by the debtor. The statute makes provision by the same section for the reorganization of a corporate debtor at the instance of the creditors. Three or more creditors who have provable claims against a corporation aggregating $1,000 or more in excess of the value of securities may file "a petition stating that such corporation is insolvent or unable to meet its debts as they mature and; if a prior proceeding in bankruptcy or equity receivership is not pending, that it has committed an act of bankruptcy within four months", and that such creditors propose that it shall effect a reorganization. § 77B (a). A later subdivision (§ 77B (i); 11 U. S. C., § 207 (i)) rounds out the statutory scheme. "If a receiver or trustee of all or any part of the property of a corporation has been appointed by a Federal, State, or Territorial court, . . . a petition . . . may be filed under this section at any time thereafter by the corporation, or its creditors as provided in subdivision (a) of this section", and upon the approval of the petition by a court of appropriate jurisdiction, "the trustee or trustees appointed under this section, or the debtor if no trustee is appointed, shall be entitled forthwith to take possession" of the property, displacing in so doing the possession of the trustee or receiver theretofore appointed.

To fix the meaning of these provisions there is need to keep in view the background of their history. There is need to keep in view also the structure of the statute, and the relation, physical and logical, between its several parts. History and structure will

be found to teach together that a receivership in a foreclosure suit is not an equity receivership within the meaning of the law.

The evils and embarrassments that brought § 77B into existence are matters of common knowledge. Corporations not insolvent in the statutory sense (*United States* v. *State of Oklahoma*, 261 U. S. 253, 260, 261), but presently unable to discharge maturing obligations, were without a statutory method for winding up their business without a sacrifice of assets. If they had recourse to voluntary bankruptcy, the forms and methods of administration were rigid and often wasteful, leaving little opportunity for cooperative endeavor on the part of all concerned. See Report of Solicitor General Thacher to the President of the United States submitted to the Congress February, 1932; Senate Document 65, 72nd Congress, 1st Session, p. 90. If they held aloof from courts and put their trust in time and effort, there was the danger of disruptive judgments, which would give a preference to a few, with involuntary bankruptcy little, if at all, deferred. The "equity receivership" flourished in this soil. At the suit of friendly creditors, embarrassed corporations joined in the prayer for the appointment of receivers to stave off other creditors more selfish or impatient, and foster whatever value was latent in the assets. There is little doubt that many of these receiverships were legitimate and helpful. None the less there resided in the practice a capacity for abuses, which will be found reflected in the decisions of this and other courts. At times the receivership was used as an instrument of fraud or covin. *Harkin* v. *Brundage*, 276 U. S. 36; *Shapiro* v. *Wilgus*, 287 U. S. 348; cf. *First National Bank* v. *Flershem*, 290 U. S. 504, 517, 518. At times, however fair in its beginnings, it was inordinately prolonged. *Michigan* v. *Michigan Trust Co.*, 286 U. S. 334. At times it had a tendency to intrench delinquency in power, and to stifle inquiry into acts of waste or spoliation. Whatever the importance of these abuses or the defects of the existing remedies, the demand became insistent for a practice more open, more responsible, more efficiently and closely regulated, and withal more surely valid, under the supervision of a court of bankruptcy.

Section 77B, enacted in 1934, was born of that demand. The remedy to be supplanted or more efficiently controlled had no relation to receiverships for the collection of rents and profits in actions of foreclosure. The remedy in view was the one generally

known as an "equity receivership", whereby the assets of a corporation were committed to the custody of a court until the time should arrive when they could be returned to the rehabilitated debtor, or if that should be impossible, divided among creditors. The receivership might come into being at the instance of a stockholder (cf. *Bryan* v. *Welch*, 74 F. (2d) 964) or oftener a creditor, but always the end to be served was essentially the same. The end was reorganization or liquidation or something akin thereto. Cf. *Continental Bank* v. *Rock Island Ry.*, 294 U. S. 648, 672; *Gordon* v. *Washington*, 295 U. S. 30, 38. Neither the members of the legal profession nor the legislators were in danger of confusing decrees directed to such an end with the sequestration of rents in an action of foreclosure. Bar associations had their special committees on "equity receiverships", with elaborate reports which were submitted to Congressional Committees.[1] Witnesses, appearing in support of one statute or another, discoursed to Congressional Committees on the failings of "equity receiverships," and on the measures needed for correction.[2] However colloquial and uncertain the words had been in the beginning, they had won for themselves finally an acceptance and a definiteness that made them fit to play a part in the legislative process. They came into the statute through an amendment proposed when the bill which was adopted as § 77 B was passing through the Senate. Congressional Record, vol. 78, part 7, 73rd Congress, 2nd Session, p. 7889. They came there freighted with the meaning imparted to them by the mischief to be remedied and by contemporaneous dissussion. *Humphrey's Executor* v. *United States*, 295 U. S. 602, 625. In such conditions history is a teacher that is not to be ignored.

Passing from the setting of the statute to a view of its internal structure, we are brought to the same conclusion, but with added firmness of conviction. A receivership in a foreclosure suit is limited and special. The rents and profits are impounded for the benefit of a particular mortgagee, to be applied upon the debt in the event of a deficiency. *Freedman's Saving & Trust Co.* v.

[1] Annual Report of the Special Committee on Equity Receiverships, Association of the Bar of the City of New York, Year Book (1927) 299, 301; *id.* (1930) 407; Hearings before the Judiciary Committee of the House of Representatives, 71st Congress, 2nd Session, April 11, 1930, H. R. 9997, 9998, 9999, 10,000, p. 29.

[2] Hearings, *supra*, at pp. 1-28. Cf. Senate Report 482, Corporate Reorganizations, March 15, 1934, 73rd Congress, 2nd Session.

Shepherd, 127 U. S. 494; *Worthen Co.* v. ~~Kavanagh~~ Kavanaugh, 295 U. S. 56, 62; *Sullivan* v. *Rosson*, 223 N. Y. 217. The corporation retains its other property, if it has any, unaffected in its power of disposition by the decree of sequestration. The creditors retain their remedies except against the income subjected to the lien. There is neither winding up of the business nor attempt to reorganize it and set it going anew. This is not the equity receivership of which the lawmakers were thinking if context and analogy have capacity to deliver up a lesson.

In our scrutiny of the context, we turn to the beginning of the section with its statement of the powers to be exercised after the approval by the court of a voluntary petition. The powers are to be those "which a Federal court would have had it appointed a receiver in equity of the property of the debtor by reason of its inability to pay its debts as they mature." § 77 B (a). But plainly there is no description here of the powers incidental to the appointment of a receiver in foreclosure. On the contrary, the words describe with aptness an equity receivership to wind up or reorganize. We cannot doubt that the same concept persisted through the section. A few sentences thereafter, in the self-same subdivision, Congress used the words in controversy, speaking compendiously of an "equity receivership" as of something ascertained and known. Surely it was not thinking of a different kind of equity receivership from that explained already, about a score of lines before. The words had been defined. In reason there could be no need to expand or redefine them.

Still scrutinizing the context, we pass to a later subdivision (§ 77 B (i)) and mark its implications. We learn from this that a petition may be approved if a receiver or trustee of all or any part of the property of a corporation has been appointed by any court in the United States and that thereupon the possession of the receiver shall be displaced and superseded. But plainly this direction, though fairly applicable to an equity receiver in the sense already indicated, was never meant to apply to a receiver in foreclosure. It is common learning that an equity receiver in suits to conserve the assets or divide them among creditors must yield to a trustee in bankruptcy. *Gross* v. *Irving Trust Co.*, 289 U. S. 342. On the other hand, it is also common learning that not even a trustee in bankruptcy may override a valid mortgage lien

or supersede a receiver who has been put into possession in fulfilment of the mortgage contract. *Straton* v. *New*, 283 U. S. 318, 322, 327; *Metcalf* v. *Barker*, 187 U. S. 165; *Lincoln Savings Bank* v. *Realty Associates Security Corporation*, 67 F. (2d) 895; *In re Bedick*, 56 F. (2d) 288; *Russell* v. *Edmondson*, 50 F. (2d) 175; *In re Brose*, 254 Fed. 664; *Carling* v. *Seymour Lumber Co.*, 113 Fed. 483, 491. Section 77 B does not make these precedents inapposite. True, the suit for the foreclosure of the mortgage may be stayed or enjoined upon a showing of necessity (§ 77 B (c) (10)); the lien may be transferred to the proceeds of a sale (§ 77 B (b)); at times the holder of the lien may have his security modified or reduced by the plan of reorganization when finally approved (§ 77 B (b), (e), (f), (h)). Cf. *Continental Bank* v. *Rock Island Ry., supra*, pp. 675, 676, 677; *Louisville Bank* v. *Radford*, 295 U. S. 555, 585. Nowhere does the statute say, however, that those results or any of them shall follow automatically upon the approval of the petition as properly filed. § 77 B (a). Only by excluding a receiver in foreclosure from the scope of subdivision (i) can we avoid anomalous encroachments upon vested rights and interests.

Such a reading of the act will help at the same time in the avoidance of other consequences too harsh or incongruous to have been intended by the Congress. The statute speaks (§ 77 B (i)) of a receiver "of all or any part of the property of a corporation." These words will have a proper office if the receivership is understood to be a general one for liquidation or for cognate purposes. They will take care of a situation where only part of the property is within the jurisdiction, so that not even an "equity receivership" will be competent always, without ancillary orders, to give possession of the whole. But the situation is very different if the receivership in view is one for the foreclosure of a mortgage. In its normal operation such a receivership does not connote possession of all the property of the debtor or even all the property within the appointing jurisdiction. The mortgage may be a lien upon one parcel or a few, leaving other property of abundant value for payment of the debts. Indeed, the cases must be many where the owner of a mortgaged building, not personally liable for the payment of the mortgage debt, will hold it the part of prudence, whether he is solvent or insolvent, to let the building go. True

indeed it is that in this case it so happens that the property subject to the mortgage is everything the debtor has. All that is but an accident, which has little, if any, bearing upon the meaning of the act. True it is also that a court receiving a petition for reorganization *in invitum* may approve or disapprove it, and that any hardship growing out of extreme or unusual situations may thereby be averted. Even so, the search at the moment is for a definition of an equity receivership that will tend to minimize anomalies, and give consistency and coherence to the statutory rule. There is little persuasion in an argument that in despite of all anomalies the system, if it is well-administered, may manage to survive.

The suggestion is faintly made that under § 3 of the Bankruptcy Act (11 U. S. C., § 21) the respondent corporation has committed an act of bankruptcy, and hence may be declared a debtor irrespective of the meaning of an "equity receivership" in § 77 B. An act of bankruptcy results *inter alia* if a "person", natural or corporate, has made a general assignment for the benefit of creditors, or if "while insolvent, a receiver or a trustee has been appointed, or put in charge of his property". Bankruptcy Act, § 3 (a) (5), 44 Stat. 662, 663; 11 U. S. C., § 21 (a) (5). There is support for the view that to satisfy this provision the receivership must be general, as contrasted with a receivership incidental to the enforcement of a lien. *Standard Accident Insurance Co.* v. *E. T. Sheftall Co.*, 53 F. (2d) 40, 41. We need not go into that question now. Enough for present purposes that the receiver was not appointed or put in charge "while" the debtor was "insolvent.". By the petitioners' admission the value of the assets far exceeds the liabilities. *In re Edward Ellsworth Co.*, 173 Fed. 699; *In re William S. Butler & Co.*, 207 Fed. 705; *Meek* v. *Beezer*, 28 F. (2d) 343; *Standard Accident Insurance Co.* v. *E. T. Sheftall & Co.*, *supra*.

The decree is

Affirmed.

Mr. Justice VAN DEVANTER took no part in the consideration or decision of this case.